IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

against

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervening Parties-Appellees.

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Statement as to Jurisdiction on Behalf of Appellants

The appellants herein file this Statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the judgment in question, and should exercise that jurisdiction.

Opinions Below

The opinion of the majority of the United States District Court for the Southern District of New York, written by Hon. Walter R. Mansfield, Associate Judge of the United States Court of Appeals for the Second Circuit, and concurred in by Hon. Morris Lasker, Judge of the United States District Court for the Southern District of New York, upheld the constitutionality of Chapter 507 of the New York Laws of 1974 as amended by Chapter 508 of the Laws of 1974. The majority opinion and the dissenting opinion of Hon. Robert J. Ward, Judge of the United States District Court for the Southern District of New York, and the judgment appealed from are set forth in the Appendix hereto and marked Appendix "A", Appendix "B" and Appendix "C", respectively.

The prior opinion of the District Court, *sub nom Committee for Public Education and Religious Liberty* v. *Levitt,** is reported in 414 F. Supp. 1174 (1976). The per curiam decision of this Court, remanding the case to the District Court for consideration in the light of the Court's decision in *Wolman* v. *Walter,* 433 U.S. 229 (1977), is reported in 433 U.S. 902 (1977).

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-

* Edward V. Regan has succeeded Arthur Levitt as Comptroller of the State of New York and Gordon Ambach has succeeded Ewald B. Nyquist as Commissioner of Education of the State of New York.

judge panel convened therein under 28 United States Code, Sections 2281 and 2284. The judgment holds Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 of the New York Laws of 1974, to be constitutional under the Establishment Clause of the First Amendment to the Constitution of the United States notwithstanding the fact that it authorizes the allocation of funds to sectarian schools.

The complaint sought declaratory and injunctive relief against enforcement of Chapters 507 and 508, alleging that the statute violated the Establishment Clause by providing payments to nonpublic sectarian schools in the State as reimbursement to the schools of the actual cost of providing specified testing and record keeping services to the State, as required by State law or regulation, and further alleging that the statute violated the Free Exercise Clause in that the statute constitutes compulsory taxation for the support of religion and religious schools.

The final judgment dismissing the complaint herein on the merits was made and entered on the 20th day of December, 1978. Notice of Appeal therefrom (Appendix "D" hereto) was duly served and filed on January 22, 1979.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment abovecited pursuant to the terms of 28 United States Code, Sec. 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast* v. *Cohen,* 392 U.S. 83

(1968); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); and *Meek* v. *Pittinger*, 421 U.S. 349 (1975).

Statute Involved

Chapter 507 of the New York Laws of 1974, provides as follows in pertinent part (the full text is set out as Appendix "E" hereto):

"Section 1. Legislative findings. The legislature hereby finds and declares that:

"The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

"In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

"More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

* * *

"Sec. 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance wtih the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

* * *

"Sec. 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers, or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

"The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount."

* * *

Chapter 508 of the New York Laws of 1974, amending Chapter 507, provides as follows in pertinent part:

"Sec. 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be

invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of and such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

(The full text of Chapter 508 of the Laws of 1974 is set out as Appendix "F" hereto.)

Questions Presented

1. Does the reimbursement by the State of nonpublic sectarian schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

2. Does Chapter 507, as amended by Chapter 508, of the New York Laws of 1974 comply with the guidelines set down by the decision of this Court in *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973), by eliminating teacher-prepared tests from those whose costs are subject to reimbursement and by providing

reimbursement for only the actual costs of the services rendered?

3. Does the decision of this Court in *Wolman* v. *Walter, supra,* require a determination that the statutes challenged herein do not violate the Constitution of the United States?

Statement of the Case

Plaintiffs commenced this action to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that those statutes violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they prevent the free exercise of plaintiffs' religion through compulsory taxation to support religious schools. The complaint also sought an injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the acts. The motion was granted.

The District Court, in its original decision, found the New York statutes to be unconstitutional in that they contravene the prohibitions of the Establishment Clause of the First Amendment, but did not reach the question of whether they also violated the Free Exercise Clause, as alleged by plaintiffs. The Court based its decision upon the decision of this Court in *Meek* v. *Pittinger, supra.* The Court found that the statutes have a "secular legislative purpose", but

also that they have the "primary effect" of advancing religion. The Court did not reach the question of whether the statutes resulted in excessive entanglement between government and religion or whether they violate the Free Exercise Clause.

On appeal, this Court vacated the District Court's judgment and remanded the case for consideration in the light of *Wolman* v. *Walter, supra.* On reconsideration, the District Court, in an opinion by Circuit Judge Mansfield, with the concurrence of District Court Judge Lasker, and over the dissent of District Court Judge Ward, upheld the constitutionality of the challenged statute.

The Questions Are Substantial

Initially we note that, for some undisclosed reason, the Horace Mann-Barnard School, intervened in this suit and is still a party thereto. Appellants do not challenge the judgment appealed from insofar as it applies to that school or any other school which though private is not religious or sectarian. They challenged the constitutionality of Chapters 507 and 508 only insofar as they encompass schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a

substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and/or (10) impose religious restrictions on what the faculty may teach. The District Court's first opinion and the judgment thereon specifically limited their scope to sectarian schools.

In respect to the sectarian beneficiaries the sole issue in the case as it now stands is whether the Court's decision in *Wolman* mandates a determination of constitutionality. We suggest that were it the Court's intention to issue such a decision its appropriate procedure in the present case, a procedure often employed by the Court, would have been to reverse the District Court's decision and direct judgment on the merits for the defendants. If, as we believe, *Wolman* does not compel a determination of constitutionality, it follows that upon the remand the majority of the District Court erred in directing judgment for the defendants and intervening defendants.

In view of the foregoing we do not deem it necessary to argue here that the District Court's original decision was a correct determination of the appropriate law as it stood prior to *Wolman.* The question before the Court at the present time is whether *sub silentie* it rejected the principles set forth in *Meek* and all its predecessors since *Lemon* v. *Kurtzman, supra,* and, as stated in the dissenting opinion of Judge Ward in the present case, "adopted a new standard under which substantial direct aid to the educational function of sectarian schools is permissible, so long as there is no substantial risk and that the aid will be used for religious purposes."

In *Wolman* the Court expressly noted that the Ohio statute therein challenged did not authorize any payment to nonpublic school personnel for the costs of administering tests, so that it could not be claimed that the schools received direct aid in the form of such payment. Moreover, the Court reasoned that since parochial school personnel did not participate in either the drafting or the scoring of the tests, they did not control the content of the tests or their results. This, the Court held, served to prevent the use of the test as part of religious teaching, and thus avoided direct aid to religion. 433 U.S. at 239-40. Unlike *Wolman,* the present case does involve direct aid to sectarian schools.

That the Court in *Wolman* did not intend to overrule and vitiate all that it had held in previous cases involving aid to parochial schools at the elementary and secondary levels is clearly established by the fact that it went further in respect to these institutions than it had gone in any of its previous decisions. While expressing itself bound by its previous decision in *Board of Education* v. *Allen, supra,* the Court quite clearly indicated that it had no intention of going beyond the specific holding therein, and accordingly struck down the provision in the Ohio statute for the loan of instructional material and equipment even if they were "incapable of diversion for religious use." 433 U.S. at 248-51.

Moreover, in another respect the Court in *Wolman* went beyond what it had decided in previous cases. For the first time it held unconstitutional the financing of programs providing field trip transportation to such places as public museums in respect to parochial school pupils. Thus, just

as it had refused to extend *Allen* beyond its narrow holding, so too it refused to extend the bus transportation case of *Everson* v. *Board of Education,* 330 U.S. 1 (1947) beyond its narrow holding. It is, we submit, difficult to reconcile the action of the Court in respect to transportation and instructional materials with a determination that the statutes challenged in the present suit do not violate the Establishment Clause.

The funds provided for record keeping under the challenged statutes have the additional impermissible effect of advancing religion by reason of the fact that attendance reporting is an essential element of the schools' religious function. It is obviously not possible effectively to restrict payments to expenses of record keeping in respect to attendance at secular classes, and indeed the challenged statutes make no effort to impose such a restriction. Absent such a restriction, the statute clearly violates the Establishment Clause's ban on advancement of religion.

Aside from advancement of religion, the challenged statutes violate the Establishment Clause by virtue of the fact that they require excessive governmental entanglement with religion. The state's educational authorities cannot effectively avoid impermissible advancement of religion without themselves becoming excessively entangled with religion.

The state aid challenged herein represents mostly reimbursement of the cost of teacher salaries and fringe benefits, based upon the number of hours teachers devote to the funded activities. These costs are calculated by computing the percentage of aggregate total work time

devoted to funded services and then multiplying the amount of aggregate wage and benefits by that percentage. To verify that none of the schools' religious functions have been served during the time charge, constant on-site inspection of the schools would be required. The inevitable and unavoidable consequence would be excessive state entanglement with religion.

Since the District Court issued its original decision in the present case, and after this Court remanded it for reconsideration in the light of *Wolman*, it decided the case of *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977). There it held that the state could not constitutionally reimburse sectarian schools for the costs of state-mandated record keeping and testing services which were incurred in reliance on the predecessor statute to Chapter 507 before it was held unconstitutional in *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973). Both the holding and the language of the Court in *Cathedral Academy* controvert the assumption, upon which the majority opinion in the District Court in the present case is based, that the Court has manifested a retreat from or weakening of the Establishment Clause strictures as interpreted and applied in all previous cases since *Lemon* v. *Kurtzman, supra.*

If, the Court held in *Cathedral Academy*, the challenged statutes authorized payments for the identical services that were to be reimbursed under the law held unconstitutional in *Levitt*, it was invalid for exactly the same reasons that required invalidation of its predecessor. If, on the other hand, the new statute empowered the New York Court of Claims to make an independent audit on the basis of which

it would authorize reimbursement only for clearly secular services, such a detailed inquiry would itself violate the Establishment Clause by requiring the State to undertake a search for religious meaning in every classroom examination offered in support of a claim, thus imposing upon the Court of Claims the role of arbiter of an essentially religious dispute. "The prospect of church and state litigating about what does or does not have religious meaning [the Court said] touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying that it will happen only once."

The challenged statute, the Court concluded, was unconstitutional because it would of necessity either have the primary effect of aiding religion on the one hand or on the other would result in excessive involvement in religious affairs. There was, in other words, no escape from either the Scylla of aid or the Charybdis of entanglement. There was no government entanglement in religious affairs involved in *Wolman*, and that decision in no way affects the disposition of that challenge in the present case. There the Court stated:

> These tests "are used to measure the progress of students in secular subjects." Nonpublic school personnel are not involved in either the drafting or scoring of the tests. The statute does not authorize any payment to nonpublic school personnel for the costs of administering the tests.

We respectfully submit that even if the New York law challenged herein does not violate the advancement prohibitions of the Establishment Clause it clearly violates the entanglement prohibition. There is no escape from

the conclusion reached by Judge Ward in his dissenting opinion:

> In the instant case, it would appear that a one-time review such as that contemplated in *Cathedral Academy* would not suffice to ensure the neutrality of the aid provided by the New York statute. Chapter 507 authorizes reimbursement for teacher-time devoted not only to the reporting and examination programs currently in effect, but also to such "other similar state prepared examinations and reporting procedures" as may be developed in the future. 1974 N.Y. Laws ch. 507, §3. Furthermore, even within the current testing programs, the examination questions presented to students and graded by state-subsidized teachers are constantly changing. While the majority may be satisfied that the risk of diversion to religious use presented by the sample examination questions and materials they have reviewed to date is not substantial, I know of no way short of continuing surveillance to guarantee that the same is true of materials and examinations prepared in the future.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction in the present case.

Dated: February 27, 1979

Respectfully submitted,

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APPENDICES

APPENDIX A

Majority Opinion

THREE-JUDGE COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

Before MANSFIELD, Circuit Judge, LASKER and WARD, District Judges.

MANSFIELD, *Circuit Judge*:

For the second time we are required to pass upon the constitutionality of Chapter 507, as amended by Chapter

508, of the 1974 Laws of New York ("the Statute"), which authorizes the State to reimburse private schools for the cost of performing certain state-mandated pupil testing and record keeping. The statute has its background in *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973) (*Levitt I*), where the Supreme Court struck down an earlier New York statute on the same subject as violative of the First Amendment's Establishment Clause, applicable to the states through the Fourteenth Amendment, on the grounds that it authorized State financing of tests prepared by sectarian school teachers which might be used for religious instruction and that the Statute had no auditing provisions designed to insure that sectarian schools would be reimbursed by the State only for secular services.

In 1974 the New York legislature responded by enacting the Statute presently under review, which sought to remedy the features found objectionable by the Supreme Court by providing for State preparation of the tests and auditing procedures to assure that private schools would be reimbursed only for these State-mandated services. Thereafter, in *Committee for Public Education and Religious Liberty* v. *Levitt,* 414 F. Supp. 1174 (1976) (*Levitt II*), we held that despite these changes the amended Statute did not pass muster under the Establishment Clause.[1] In doing so we relied heavily on *Meek* v. *Pittenger,* 421 U.S. 349 (1975),

1. The plaintiffs' complaint also alleged that the Statute violated the Free Exercise Clause. That claim was not pressed in the first hearing of the case, and our decision on the Establishment Clause made it superfluous. The plaintiffs have not pressed the theory in the argument following remand, so we have not addressed it. We do note that the Supreme Court has rejected previous attempts to invalidate public financial assistance to sectarian schools under the Free Exercise Clause. *Tilton* v. *Richardson,* 403 U.S. 672, 689 (1971); *Board of Education* v. *Allen,* 392 U.S. 236, 248-49 (1968).

which postdated *Levitt I.* One year after our decision the Supreme Court decided *Wolman* v. *Walter,* 433 U.S. 229 (1977), following which it vacated our judgment in *Levitt II* and remanded the case for reconsideration in light of *Wolman.* Three justices voted to affirm our decision. 433 U.S. 902 (1977).[2]

Following remand we held an evidentiary hearing to receive proof relevant to the issues. With commendable cooperation the parties succeeded in agreeing upon the pertinent evidence which was then furnished to us in the form of a stipulation of facts and exhibits. Since *Wolman* has in our view relaxed some of *Meek*'s constitutional strictures against state aid to sectarian schools we now conclude, upon application of *Wolman*'s standards to the record before us, that amended Chapter 507 may be upheld as constitutional.

The amended Statute, which became effective July 1, 1974, provides for reimbursement to private schools of the "actual cost" of complying with State requirements for public attendance reporting and the administration of State-prepared standardized examinatoins such as Regents examinations and the pupil evaluation program. These reports and tests are required of public and private schools alike and are designed to improve the educational program offered in New York schools.

The Statute authorizes reimbursements for two categories of services: the administration of State-prepared examinations and the execution of State-required reporting procedures. The State prepares a large number of examinations for use in evaluating the quality of the education

2. The vote of the other six Justices to vacate and remand does not express an opinion on the merits. See *Hunt* v. *McNair,* 413 U.S. 734 (1973).

received in New York schools and the abilities of individual students. At the present time, most of these tests are administered within one of three major examination programs. First, there is the Pupil Evaluation Program (PEP), consisting of standardized reading and mathematics achievement tests. These tests must be administered to all students in grades 3 and 6. Tests for ninth grade students are also prepared for use by schools on an optional basis. These tests are entirely multiple-choice, objective examinations and can be graded by hand or machine. Complete instructional manuals for giving and scoring the examinations are furnished to the school by the State. The scores are returned by school personnel to the State Education Department.

The second battery of tests are the comprehensive achievement tests (Regents "end-of-the-course" examinations) based on State courses of study for use in grades 9 through 12. Presently provided in 19 subjects,[3] these tests consist largely or entirely of objective questions with multiple-choice answers. Some of the examinations contain one or two essay questions or mathematical problems involving extended answers, which, of course, cannot be graded mechanically. Detailed instructional manuals are furnished by the State to schools for the administration of these exams and rating guides for their scoring of them. Each school is required to submit the passing and failing papers in certain subjects to the State Education Department for review. After the March/April and August exam dates, schools return all completed exam papers. In January and

3. Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science; English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish.

June a random sampling procedure is used by the State to select completed examination papers for review.

The third principal set of examinations is the Regents Scholarship and College Qualification Test (RSCQT), which has been used as a basis for awarding scholarships to New York high school students and for admitting students to various units of the State University. All answer papers for the RSCQT are scored at the State Education Department.

The Statute also authorizes reimbursements to private schools for the cost of preparing informational reports required by State law. Each year, private schools must submit to the State a Basic Educational Data System (BEDS) report. This report contains information regarding the student body, faculty, support staff, physical facilities, and curriculum of each school. Schools are also required to submit annually a report showing the attendance record of each minor who is a student at the school. N.Y. Educ. Law §3211 (McKinney).

Schools which seek reimbursement must "maintain a separate account or system of accounts for the expenses incurred in rendering" the reimbursable services, and they must submit to the N.Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. Chapter 507, as amended, §§4-5. Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attributable to administration of the examinations and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Com-

missioner audits vouchers or other documents submitted by the schools to substantiate their claims. §§6-7. The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately. §7. It is estimated that the reimbursements to private schools under the Statute will amount to $8,000,000 to $10,000,000 a year.

The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service. However, the total amount paid for these attendance-taking services amounted to only approximately 1% to 5.4% of the total amount budgeted by the schools for salaries and fringe benefits.

Discussion

The late Justice Harlan once observed that "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz* v. *Tax Commission*, 397 U.S. 664, 694 (1970). However, in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court established three criteria for a constitutional grant of State assistance to sectarian

institutions: (1) the assistance program must have "a secular legislative purpose," (2) it must not have a "primary effect" of advancing or inhibiting religion, and (3) it must not excessively entangle the government in the affairs of sectarian institutions.

This now familiar tripartite test may have given some orderliness to Establishment Clause analysis, but for the most part it has simply identified more precisely the areas of uncertainty. Unfortunately, Justice Harlan's observation is as appropriate now as it was in 1970. We still face confusing and imprecise dictates. However, in such additional light as is shed by *Wolman*, we believe that the statute here does not transgress the "blurred, indistinct and variable" limitations imposed upon federal and state governments by the Establishment Clause. 403 U.S. at 614.

As in *Levitt II*, we can pass quickly over the first leg of the Establishment Clause test. The statute clearly manifests a secular legislative purpose. See 414 F. Supp. at 1178. The central issue, as frequently happens in cases involving the Establishment Clause, is whether the Statute has a "primary purpose" (which includes a "direct and immediate effect," *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 783 n.39 (1973)), of advancing religion. In *Levitt II* we concluded that *Meek* v. *Pittenger*, *supra*, virtually mandated our holding that the statute had such an effect, since the Supreme Court there ruled that "substantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a whole." If, as seemed to be the case, the Court considered the secular and religious dimensions of education provided in sectarian schools to be inseparable, it appeared to us to follow that

direct aid to such schools, "even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity." 421 U.S. at 366. We reasoned that since administration of examinations and record keeping are "as much a part of the educational function of private schools as classroom instruction in secular subjects," the State subsidies for these secular functions aided the sectarian enterprise as a whole and thereby directly advanced religion. 414 F. Supp. at 1179-80.

The concept that religion so pervades lower sectarian schools that even wholly secular instruction or equipment is always subject to the risk of religious orientation, rendering separation of secular and religious educational functions extremely difficult, has repeatedly been posed by the Supreme Court as an inherent problem faced in determining the constitutionality of state aid to sectarian schools. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 618-19 (1971); *Levitt I, supra,* 413 U.S. at 480; cf. *Tilton* v. *Richardson,* 403 U.S. 672, 680-81 (1970) (this concept inapplicable to church-affiliated colleges). It appeared to us that in *Meek* the Court, in lieu of a case-by-case analysis of evidence to assess the degree of risk that state aid might be used for religious purposes, was establishing a *per se* rule prohibiting *any* state aid to educational activities carried out in sectarian schools, except for the loan of textbooks to students, which was upheld in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). Indeed Justice Stewart observed in his plurality opinion that the "diminished probability" that religious doctrine might become intertwined with secular instruction would not render state aid permissible as

long as the potential existed. 421 U.S. 370-71. Applied consistently, *Meek* would allow only state aid coming under the mantle of "general welfare" programs serving the health and safety of school children.[4] See *Wolman, supra,* 433 U.S. at 262 (Powell, J., concurring in part and dissenting in part).

Although *Wolman* does not expressly renounce *Meek*'s theory that aid to a sectarian school's education activities is *per se* constitutional,[5] it does revive the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.[6] See 433 U.S. at 240, 244, 247-48, 251, 254. It is this concept which we apply to the provisions of the statute before us.

In *Wolman* the Court upheld a section of an Ohio statute authorizing expenditure of State funds:

> "To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in public schools of the state." Ohio Rev. Code Ann. §3317.06(j) (Supp. 1976).

4. *Meek* did sustain the constitutionality of State expenditures for secular school textbooks to be loaned to sectarian school children or their parents. Such assistance, first sanctioned in *Allen, supra,* would be indefensible under a strict application of *Meek*'s rationale. In *Wolman* the Court indicated that *Allen* is now followed solely in deference to *stare decisis* and, consequently, is limited to its facts.

5. Indeed, Justice Blackmun's opinion for the Court in *Wolman* recites some of Justice Stewart's sweeping language in *Meek,* 433 U.S. at 249-50.

6. Of course, this certainty must be achieved without an excessive entanglement of the State with the sectarian institution. We examine the entanglements issue separately, *infra,* pp. 16-17.

The State of Ohio furnished the tests which were administered and scored by state personnel. Justice Blackmun reasoned that as the sectarian schools were unable to control the content or result of state-prepared examinations, there was no substantial danger that the exams would be used for religious teaching. 433 U.S. at 240. If, as the Court had asserted in *Meek,* the secular and religious dimensions of sectarian school education were inseparable, the examinations thus provided and graded by the State would have furthered religious education, even though they covered only secular subjects. *Wolman,* then, must be viewed as rejecting the concept that State support for educational activities necessarily advances religion.

In the present case all tests provided under the Statute, like those supplied under the Ohio law, are prepared by the State. However, except for the RSCQT exams, which are graded exclusively by personnel of the State Education Department, the tests furnished by New York State, unlike those supplied under the Ohio statute, are administered and graded by sectarian school personnel, for whose services in performing this task and in taking attendance the private schools are reimbursed by the State. The question, therefore, is whether these features of the New York law represent a sufficient distinction from *Wolman* to render it inapplicable and to call for nullification of the Statute. We think not. Although these features render the constitutionality of the New York Statute a closer question than that presented by the Ohio law in *Wolman,* the risk of the New York examinations or services being diverted to religious purposes is altogether too insubstantial to require a departure from *Wolman.* The secular nature of the examinations and the almost entirely mechanical method pre-

scribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services.

Turning first to the RSCQT examinations, the risk of their being used for religious purposes through grading is non-existent, since they are corrected exclusively by State Education Department personnel. The tests administered under the Pupil Evaluation Program (PEP) consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State.

Similarly, the overwhelming majority of the questions on the comprehensive achievement tests consist of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination. Although some of the comprehensive achievement examinations may, among scores of multiple-choice questions, have a question asking students to write an essay on one of several topics specified in the exam, which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and to grade the answer accordingly, the likelihood of such an event is so minimal and the State procedures designed to guard against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the

sponsoring church." *Levitt I, supra,* 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures (described above) provide an adequate check against any misuse of essay questions.[7]

In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. As the Supreme Court pointed out in *Nyquist, supra,* 413 U.S. at 771, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is for that reason alone, constitutionally invalid." In the absence of some other potential for diversion we fail to find the possible indirect benefit from this feature of the Statute sufficient to warrant its nullification.

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7. Our dissenting brother takes the view that a one-time annual review of the State-prepared examination materials will not suffice to ensure the neutrality of the State aid. Examinations prepared by State personnel for use in *all* schools in the State (public and private), however, unlike the examinations prepared by sectarian school teachers in *Levitt I,* do not present a "substantial risk" of being designed, unconsciously or otherwise, to further religious education. It was the presence of this risk that induced the Supreme Court to hold in *Levitt I* that the State could not reimburse sectarian schools for the cost of administering in-class examinations and to hold in *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977), that the State could not provide reimbursements for costs incurred prior to the decision in *Levitt I* without making a detailed inquiry into the content of each examination, which itself would violate the Establishment Clause. See 413 U.S. at 480, 434 U.S. at 131.

We see no indication in either of these decisions that the State would have to make individual determinations regarding the neutrality of State-prepared examinations. Indeed, in *Wolman* the Court recognized as a general rule that the performance by state personnel of their functions outside of the sectarian school environment does not present any significant danger of promoting religious values, even when their functions relate directly to the educational process. 433 U.S. at 247-48. Accordingly, in the absence of any reason for believing that State-prepared examinations here might be radically changed to elicit or encourage religious views, our determination that the examinations do not foster religion should be definitive.

The second distinction between the Ohio statutory provision upheld in *Wolman* and the New York Statute is that the latter, unlike the former, authorizes direct reimbursement to non-public schools for their administration of the exams and for attendance-taking. Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403 at 621; and *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams.

The Supreme Court's disapproval of statutes authorizing cash payments has turned on the fact that no reasonable guarantee was provided for insuring that the money would be applied only to secular activities. See, e.g., *Levitt I, supra,* 413 U.S. at 480; *Nyquist, supra,* 413 U.S. at 774; *Lemon, supra,* 403 U.S. at 619-22. In each of these cases the Court found either that no effort had been made to

restrict the benefit of the financial aid to wholly secular activities or that any efforts to do so would have involved an intolerable level of state surveillance of the sectarian institutions. *Levitt I, supra,* at 480; *Nyquist, supra,* at 780; *Lemon, supra,* at 620-22; cf. *Walz, supra,* 397 U.S. at 675. These decisions thus imply that direct cash payments are permissible if they serve exclusively secular purposes and do not involve excessive entanglement. For example, in *Levitt I,* where the Court struck down the predecessor to amended Chapter 507, the Court commented that the invalid lump-sum payments could not be reduced by a court to "an amount corresponding to the actual costs incurred in performing reimbursable secular services" because this "is a legislative, not a judicial, function." 413 U.S. at 482. The implication is that if the legislature chose to exercise its power to fund purely secular activities, the Court would not stand in the way. See *Nyquist, supra,* 413 U.S. at 774. In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind.

Turning to the Statute's reimbursement of a sectarian school's attendance-taking, as distinguished from administration of examinations, since record-keeping is essentially a ministerial task lacking ideological content or use, it is not challengeable on *Meek*'s theory that any state assistance to the educational process advances religion. Of course it might be argued that since sectarian schools would otherwise be required to expend funds for the taking and recording of attendance, they benefit to the extent that reimbursement facilitates an activity that is essential to the conduct of the sectarian enterprise as a whole or at least "frees up" funds for religious purposes. The "freeing-up" argument, however, has been consistently rejected by the Supreme Court. See, e.g., *Nyquist, supra,* 413 U.S. at 775. Although record-keeping may be part of the operation of a sectarian school, we do not view it as approaching the status of a facility such as a classroom, which might be used for secular education, see *id.* In our view it is closer to the operation of buses for the transportation of children to sectarian schools, the cost of which may be reimbursed by the State without violation of the Establishment Clause. *Everson* v. *Board of Education, supra.* Although school busing may be analogized to "general welfare" services of the type upheld in *Meek* and *Wolman,* the Court in *Wolman* rationalized reimbursement for busing as permissible for the reasons that the activity is unrelated to any aspect of the curriculum and the school does not determine the frequency of the activity subsidized. 433 U.S. at 253. In view of *Wolman*'s affirmation of this aspect of *Everson* we are satisfied that the State's subsidization of attendance-taking in the present case should be upheld, particularly in the absence of any suggestion that such record-keeping can be used to foster an ideological outlook.

Having concluded that amended Chapter 507 passes the primary-purpose test, we pass on to the question of whether it excessively entangles the State in the administration of sectarian institutions, an issue which we were not required to resolve in *Levitt II,* in view of our holding there. 414 F. Supp. at 1180.

Where a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities

are religious in character, the risk of entanglement is too great to permit governmental invlovement. See, e.g., *Lemon, supra,* 403 U.S. at 619-22; *Meek, supra,* 421 U.S. at 370-71. The activities subsidized under the Statute here at issue, however, do not pose any substantial risk of such entanglement.[8]

The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by §7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute

8. We do not believe that the State must review every examination paper whose mark might have been influenced by the religious values or beliefs of the grader in order to be "certain" that the subsidized teacher's time is not used to inculcate religion. See *Lemon, supra,* 403 U.S. at 609. Whether the procedures employed by the State to prevent improper use of its aid achieve the requisite degree of certainty must be determined in light of the subsidized activity's potential for use as a vehicle for religious indoctrination. *Lemon* involved subsidies for personnel expenses attributable to the teaching process as a whole (for certain classes), an activity which presents a continuous and comprehensive potential for religious indoctrination, since the omniscient influence of the teacher, particularly in lower schools, is the paramount factor determining the character of classroom instruction. See *Lemon, supra,* 403 U.S. at 618.

In contrast, the opportunity for religious indoctrination in the grading of end-of-course regents examinations is virtually nil. As we have noted, these examinations, given but once a year in any one class, require the grader to exercise subjective judgment only in connection with one, or possibly two, questions out of scores. These questions are prepared by the State, which provides instructions to guide the grading of essay questions. Clearly, the potential for advancing religion associated with the subsidized activities in this case is vastly inferior to that which the Court faced in *Lemon.*

are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision.[9]

For the foregoing reasons we conclude that Chapter 507, as amended, does not violate the Establishment Clause.

Settle judgment on notice.

Dated: New York, N.Y.
December 11, 1978

WALTER R. MANSFIELD

Walter R. Mansfield, U.S.C.J.

MORRIS E. LASKER

Morris E. Lasker, U.S.D.J.

I dissent in a separate opinion.

ROBERT J. WARD

Robert J. Ward, U.S.D.J.

9. The possibility that the process of appropriating funds to implement amended Chapter 507 might divide the State legislature along religious lines, which has not been suggested by the parties, does not pose a factor of sufficient consequence to warrant invalidation of the subsidization as constitutionally impermissible. See *Meek, supra,* 421 U.S. at 365, n.15. Indeed, in *Wolman* the Court upheld several provisions of the Ohio statute, involving annual expenditures of millions of dollars, without any reference to the potential for such discord in annual legislative consideration of expenditure bills.

APPENDIX B

Dissenting Opinion

Committee for Public Education and Religious Liberty, et al. v. *Arthur Levitt, et al.*
74 Civ. 2548 RJW

WARD, *District Judge* (Dissenting)

When the constitutionality of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("Chapter 507" or "the statute") was previously raised before this three-judge Court, we held that the statute violated the Establishment Clause because it had a primary effect[1] of advancing religion. *Committee for Public Education* v. *Levitt*, 414 F. Supp. 1174 (S.D.N.Y. 1976) (*"Levitt II"*). Our decision was based in large measure on the Supreme Court's holding in *Meek* v. *Pittenger*, 421 U.S. 349 (1975). In *Meek*, the Court invalidated a Pennsylvania statute's $12 million authorization for the loan of secular, nonideological, and neutral instructional materials to that state's predominantly church-related nonpublic schools. The Court reasoned:

> To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." 374 F. Supp., at 660. But

1. It is well-established that "[i]n order to pass muster [under the Establishment Clause], a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977); *accord Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 748 (1976); *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772-73 (1973); *Lemon* v. *Krutzman*, 403 U.S. 602, 612-13 (1971).

faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair*, 413 U.S. 734, 743.

The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U.S. at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id.*, at 657 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689. For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education &*

Religious Liberty v. *Nyquist* 413 U.S., at 781-783, and n.39, and thus constitutes an impermissible establishment of religion.

421 U.S. at 365-66 (footnote omitted).

Reading *Meek* to state that the provision of substantial amounts of direct aid to the educational function of sectarian elementary and secondary schools impermissibly advanced religion by aiding the sectarian school enterprise as a whole, we struck down Chapter 507's programs reimbursing New York sectarian schools[2] for the costs—primarily teacher salaries and fringe benefits[3]—incurred in complying with state-mandated testing and pupil attendance reporting. Eighty-five percent of the 1,954 nonpublic institutions eligible to receive reimbursement under the statute were religiously-affiliated elementary and secondary schools. The purpose of many of those schools was to provide an integrated secular and religious education, and their teaching process was largely devoted to instilling religious values and belief.[4] *See Meek, supra*, 421 U.S. at 356,

2. In view of its clear severability clause, we upheld the statute to the extent that it authorized funds to nonsectarian private schools. *Levitt II, supra*, 414 F. Supp. at 1180 & n.9.

3. The reimbursement was not for salary supplements given teachers to compensate for the time devoted to funded activities, but rather represented a percentage of ordinary compensation which would have been paid even if the state-required services were not performed. *Levitt II, supra*, 414 F. Supp. at 1176.

4. According to defendants' answers to plaintiffs' interrogatories filed prior to our decision in *Levitt II*, the recipients of the aid included schools which: "(1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the

(footnote continued on next page)

364, 366; *Lemon* v. *Kurtzman*, 403 U.S. 602, 616-17 (1971). As in *Meek*, the amount of aid, estimated at $8-$10 million annually, was substantial[5] and the form of the aid—payments to the schools themselves, subsidizing their operating costs—was direct. Accordingly, even though Chapter 507 was intended to aid only the secular educational function of the schools,[6] we held that the statute inevitably resulted in the direct and substantial advancement of religious activity.

My colleagues do not contend that we misconstrued or misapplied *Meek*'s standard in our opinion in *Levitt II*. It is rather their position that in *Wolman* v. *Walter*, 433 U.S. 229 (1977), the Court *sub silentio* rejected the principles set forth in *Meek* two years earlier,[7] and adopted a new standard under which substantial direct aid to the educational function of sectarian schools is permissible, so long as there is no substantial risk that the aid will be used for religious purposes. I see in *Wolman* no such retreat from *Meek* or reformulation of the applicable principles. I believe that *Meek* remains valid and that Chapter 507 cannot pass constitutional muster thereunder. Accordingly, I respectfully dissent.

religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and/or (10) impose religious restrictions on what the faculty may teach." *Compare Meek, supra*, 421 U.S. at 356.

5. Compare the $12 million for the loan of instructional materials and equipment involved in *Meek*, where more than 75% of the 1,320 schools were religiously affiliated. 421 U.S. at 364-65.

6. The legislative purpose of the statute was "to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabiliites." 1974 N.Y. Laws ch. 507, §1.

7. Those principles were reaffirmed by the Court in *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 753-55 (1976).

That the testing and scoring provision in *Wolman*[8] was upheld does not, in my opinion, indicate that the Court has rejected *Meek*'s standard as to the permissibility of aid to the educational function of sectarian schools. *Meek* did not hold that all such aid was *ipso facto* unconstitutional, but only that substantial direct aid was. 421 U.S. at 359, 364-66. In upholding *Wolman*'s provision, the Court expressly noted that the Ohio statute did not authorize any payment to public school personnel for the costs of administering the tests. 433 U.S. at 239. Thus, it could not be claimed that the schools received direct aid in the form of such payments. Moreover, the Court reasoned, since nonpublic school personnel did not participate in either the drafting or the scoring of the tests, "[t]he nonpublic school [did] not control the content of the test or its result. This serve[d] to prevent the use of the test as a part of religious teaching, and thus avoid[ed] that kind of direct aid to religion found present in *Levitt* [v. *Committee for Public Education*, 413 U.S. 472 (1973)]."[9] 433 U.S. at 239-40. Be-

8. The Ohio statute under review in *Wolman* authorized the state "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." 433 U.S. at 238-39.

9. In *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973) (*"Levitt I"*), the Court invalidated the predecessor statute to Chapter 507, which had provided for reimbursement to sectarian schools of the expenses of teacher-prepared testing as well as standardized examinations and recordkeeping. While the Court's decision focused on the fact that no means were available to assure that the internally-prepared tests were free of religious instruction, *id.* at 480, the Court in *Wolman* made it clear that Levitt I did not imply that reimbursement to religious schools for the costs of testing would be constitutionally permissible if teacher-prepared examinations were eliminated. "The Court did not reach any issue regarding the standardized testing, for it found its funding inseparable from the unconstitutional funding of teacher-prepared testing." 433 U.S. at 240 n.8.

cause the Ohio statute, in contrast to Chapter 507, did not involve direct aid to sectarian schools, I see no inconsistency between *Meek* and the result in *Wolman*.

Nor do I believe that there is anything in *Wolman* which stands for the proposition that substantial direct aid to the religious schools' educational function which has some potential for religious use is now constitutionally permissible so long as the possibility is not substantial. In addition to the testing and scoring services, the only provisions upheld in *Wolman* which included aid to the schools' educational function[10] were the programs for therapeutic, guidance, and remedial services provided directly to students by public employees at public facilities,[11] *id.* at 248, and for the loan of textbooks to students, *id.* at 238. So far as I can discern, there is nothing in Justice Blackmun's opinion which indicates that either the testing and scoring or the therapeutic services were seen as presenting any potential whatsoever for diversion to religious use. Nor is there any

10. The Court also upheld the provision of speech, hearing, and psychological diagnostic services to pupils attending nonpublic schools on the basis that they were public health services which could constitutionally be supplied to nonpublic school children as part of a general legislative program made available to all students. 433 U.S. at 242-44. The permissibility of including sectarian schools in programs providing "bus transportation, school lunches, and public health facilities—secular and nonideological servicese unrelated to the primary religion-oriented educational function of the sectarian school" was explicitly reaffirmed in *Meek*. 421 U.S. at 364, 371 n.21; *accord, Lemon, supra,* 403 U.S. at 616-17; *Everson* v. *Board of Education,* 330 U.S. 1, 14, 17-18 (1947). The Court indicated that the Pennsylvania statute's provision of diagnostic speech and hearing services would have been permissible as such a general welfare service. 421 U.S. at 371 n.21. The program was invalidated, however, because it was found to be unseverable from the unconstitutional provisions of the statute. *Id.; accord, Wolman, supra,* 433 U.S. at 243-44.

11. As with the testing and scoring services, no direct aid was involved. No payments were provided to the schools, nor did the schools exercise control over the services. 433 U.S. at 244-48.

suggestion that the aid would have been acceptable had any such possibility existed. Indeed, in order to uphold the loan of textbooks, the Court was forced to rely on the "unique presumption" of the non-divertibility of such aid created in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). 433 U.S. at 251-52 n.18. Furthermore, the Court struck down the provision for the loan of instructional materials and equipment which were "incapable of diversion to religious use." *Id.* at 248-51.

Moreover, the Court clearly reaffirmed *Meek* in *Wolman* when it invalidated the programs providing field trip transportation and services to nonpublic school students and the loan of instructional materials and equipment to pupils or their parents. In holding that the field trip provision had the impermissible effect of advancing religon, the Court, relying on *Meek,* reasoned that "the field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution," impermissible direct aid is the inevitable result. *Id.* at 254. Furthermore, in striking down the loan of instructional materials and equipment, Justice Blackmun's opinion quoted *Meek* as follows:

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman,* 403 U.S., at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably

> intertwined.' *Id.*, at 657 (opinion of Brennan, J.)." 421 U. S., at 366.

Id. at 249-50. The Court concluded, just as it had in *Meek*, that "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flow[ed] in part in support of the religious role of the schools." *Id.* at 250.

Given this reaffirmation of *Meek*, it seems clear to me that the constitutional standard set forth in that opinion is still controlling. I believe that Chapter 507 does not satisfy that standard. The statute is intended to compensate for secular educational services, but the funds granted thereunder flow directly to schools dedicated to a religious mission. Therefore, the state aid "inescapably results in the direct and substantial advancement of religious activity." *Meek, supra,* 421 U.S. at 366.

In my opinion, the funds provided for recordkeeping under Chapter 507 have the impermissible effect of advancing religion for still another reason. Pupil attendance reporting is as essential to the schools sectarian educational function as it is to the secular aspect of the curriculum. Yet, as was the case with the payments to nonpublic schools for nonideological maintenance and repair services involved in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 774-80 (1973), no attempt has been made to restrict payments to those expenditures which are related exclusively to the schools' secular functions. Nor is such a restriction possible. Consequently, as in *Nyquist,* the state aid impermissibly advances religion by directly subsidizing the religious activities of sectarian schools. *Cf. Levitt* v. *Committee for Public Education,* 413 U.S. 472, 480 (1973) (*"Levitt I"*).

Chapter 507 has the further constitutional defect, in my view, of requiring excessive governmental entanglement with religion. My colleagues have recognized that some of the testing materials could be diverted to religious use and that the records submitted in support of claims for reimbursement could be inaccurate. Once these possibilities for diversion have been detected, it seems to me that excessive state entanglement with religion is inevitable in order to avoid the impermissible effect of advancing religion:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. . . .
>
> . . . But the potential for impermissible fostering of religion is present. . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . .
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . .

Lemon, supra, 403 U.S. at 618-19; *accord, Wolman, supra,* 433 U.S. at 254; *Meek, supra,* 421 U.S. at 369-70.

In order to be *certain* that teachers whose salaries are subsidized by Chapter 507 do not use the testing materials for religious purposes, I believe that the state's current procedure of reviewing a random sample of examination papers for academic content would have to be supplemented by a detailed search for religious values or belief in the grading of all test papers in which the teacher exercises subjective judgment. For "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective accept-

ance of the limitations imposed by the First Amendment." *Lemon, supra,* 403 U.S. at 619; *accord, Wolman, supra,* 433 U.S. at 254; *see Levitt I, supra,* 413 U.S. at 481. Such a system of continuous monitoring of the grading of examinations by religious school teachers would constitute excessive entanglement between church and state. *See Wolman, supra,* 433 U.S. at 254; *Meek, supra,* 421 U.S. at 369-72; *Lemon, supra,* 403 U.S. at 617-19.

In addition, most of the state aid under Chapter 507 is for reimbursement of the cost of teacher salaries and fringe benefits. Such reimbursable costs are based upon the number of hours teachers devote to the funded activities. The schools are required to submit a form entitled "Justification of Salary and Fringe Benefit Costs Claimed For State Aid For Testing, Reporting and Evaluating" on which the reimbursable costs are calculated by first computing the percentage of aggregate total work time devoted to funded services and then multiplying the amount of aggregate wages and benefits by that percentage. While this form and the additional reporting and auditing procedures[12] suffice to ensure the mathematical accuracy of the

12. Chapter 507 provides in this regard:

§4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing

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computations, they do nothing to verify that the percentage of total time claimed for reimbursable activities is based upon the number of hours teachers have actually

and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until completion of such audit procedures.

§6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

In addition, section 176.2 of the Regulations of the Commissioner of Education provides:

Application for apportionment and required accounting records.

(a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall

(footnote continued on next page)

devoted to purely secular functions.[13] Indeed, in order to be certain, as the Establishment Clause demands, that none of the schools' religious functions have been served during the time charged, constant on-site inspection of sectarian schools would be required. Such a system of continuous state surveillance of the activities of religious schools

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submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner or Education.

(b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:

(1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include accounts for salaries, supplies and materials, contractual expenses and fringe benefits.

(2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.

(3) An individual salary record for each employee involved in providing services for which apportionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.

(4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

13. I do not agree with my colleagues' suggestion that the accuracy of the time charged can be safeguarded by comparing the claims of private schools with those of public schools. To my knowledge, there is nothing in the record which indicates that any such comparison is included in the auditing procedures, *see* Footnote 12, *supra*, or which suggests that public schools even maintain comparable time records. In any event, I do not believe that comparisons by approximation are sufficient to satisfy the dictates of the Establishment Clause.

would clearly constitute excessive state entanglement with religion. *See Lemon, supra,* 403 U.S. at 617-19, 621-22.

Moreover, in my opinion, the instant statute has resulted in excessive entanglement of yet another sort. To determine the constitutionality under the Establishment Clause of the aid provided by Chapter 507, my colleagues have examined for possible religious meaning the sample tests and other documents submitted by the parties and have decided on the basis of this evidence that there was no substantial risk that the state aid could be used for religious purposes. The Supreme Court has stated, however, that the very adjudication required under such an approach is, in itself, excessive governmental entanglement with religion. In *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977), the Court held that New York State could not reimburse sectarian schools for the costs of state-mandated recordkeeping and testing services which were incurred in reliance on the predecessor statute to Chapter 507 before it was held unconstitutional in *Levitt I.* In response to the sectarian school plaintiff's argument that the Court of Claims would review all expenditures for which reimbursement was sought, in order to be certain that state funds did not subsidize sectarian activities, Justice Stewart, speaking for the majority, explained:

> [E]ven if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials.

> In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court . . . would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. Cf. *Presbyterian Church* v. *Blue Hull Mem. Presb. Church,* 393 U.S. 440.

434 U.S. at 132-33.

In the instant case, it would appear that a one-time review such as that contemplated in *Cathedral Academy* would not suffice to ensure the neutrality of the aid provided by the New York statute. Chapter 507 authorizes reimbursement for teacher-time devoted not only to the reporting and examination programs currently in effect, but also to such "other similar state prepared examinations and reporting procedures" as may be developed in the future. 1974 N.Y. Laws ch. 507, §3. Furthermore, even within the current testing programs, the examination questions presented to students and graded by state-subsidized teachers are constantly changing. While the majority may be satisfied that the risk of diversion to religious use presented by the sample examination questions and materials they have reviewed to date is not substantial, I know of no way short of continuing surveillance to guarantee that the same is true of materials and examinations prepared in the future.

Accordingly, I conclude that Chapter 507 is unconstitutional under the Establishment Clause to the extent that it authorizes the allocation of state funds to sectarian schools,[14] both because it has a primary effect of advancing religion and because it fosters excessive governmental entanglement with religion.

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14. Section 9 of the statute contains a severability clause in which the legislature expressed a clear intent that the act remain in force as to nonsectarian schools should its application as to sectarian schools be held to violate the Establishment Clause. *See* 1974 N.Y. Laws ch. 507, as amended by ch. 508, §9. *Compare Sloan* v. *Lemon,* 413 U.S. 825, 833-34 (1973). Accordingly my conclusion as to the unconstitutionality of the statute is limited to its application to sectarian schools.

APPENDIX C

Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

This action having come on for hearing before the Court, Honorable Walter R. Mansfield, United States Cir-

cuit Judge, Honorable Morris E. Lasker and Honorable Robert J. Ward, United States District Judges; and the issues having been fully briefed and argued; and the Court having rendered a decision in an Opinion filed December 12, 1978, Judge Ward dissenting;

Now, THEREFORE, it is hereby

ORDERED AND ADJUDGED that the Complaint be, and it hereby is, dismissed on the merits.

Dated: New York, New York
December 20, 1978

Walter R. Mansfield, U.S.C.J.

Morris E. Lasker, U.S.D.J.

Robert J. Ward, U.S.D.J.

JUDGMENT ENTERED:

Raymond F. Burghardt
U.S. District Court
Southern District of New York
December 20, 1978

APPENDIX D

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

Notice is hereby given that the plaintiffs herein appeal to the Supreme Court of the United States from the judg-

ment entered in this action on the 20th day of December, 1978, dismissing the complaint herein on the merits.

This appeal is taken pursuant to 28 U.S.C. §1253.

January 22, 1979

/s/ Leo Pfeffer

Leo Pfeffer
Attorney for Plaintiffs

Raymond F. Burghardt, Clerk
U. S. District Court
Southern District of New York

APPENDIX E

Full Text of Chapter 507, New York Laws of 1974, as Amended by Chapter 508, New York Laws of 1974

AN ACT

To provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that:

The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

To fill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being educated within their individual capabilities.

In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern

that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

§ 2. Definitions.

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 3. Apportionment.

The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

§ 4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§ 5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

§ 6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§ 7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

§ 8. Noncorporate entities.

Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate entity as may be designated for such purpose pursuant to regulations promulgated by the commissioner. A school which is a corporate entity may designate another corporate entity for the purpose of receiving apportionments made for the benefit of such school pursuant to this act.

§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all re-

maining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.

§ 10. This act shall take effect July first, nineteen hundred seventy-four.

NOTE: Section 9 of the bill was added by Chapter 508 of the Laws of 1974.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

against

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervening Parties-Appellees.

APPENDIX

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500
Attorney for Appellants

TABLE OF CONTENTS

Docket Entries

DATE	PROCEEDINGS
6-20-74	Filed complaint and issued summons.
7- 3-74	Filed Notice of Motion to Intervene as a deft. by Gene Crescenzi. Ret. Sine Die
7- 9-74	Filed summons and marshals return. Served: Arthur Levitt on 7-2-74 Ewald B. Nyquist on 7-3-74.
7-18-74	Filed Affidavit in opposition to motion to intervene by Jean M. Coon.
7-18-74	Filed defts' Answer
10-11-74	Filed Memo. End. on motion dtd. 7/3/74. Motion is denied without costs. So Ordered Ward J. (mailed notice)
10-18-74	Pre-Trial Conference Held by Ward
11-13-74	Filed affidavit and notice of motion for leave to intervene by Horace Mann Barnard School, La Salle Academy, Long Island Lutheran High School, St. Michael School & Yeshivah Rambam. ret. 11/26/74.
11-13-74	Filed Memorandum of law of Horace Mann Barnard School, La Salle Academy, Long Island Lutheran High School, St. Michael School & Yeshivah Rambam in support of motion to intervene.
11-27-74	Filed Memo. Endd on motion dtd. 11/13/74. Motion Granted. Submit Order. So Ordered Ward J. (mailed notice)

Docket Entries

DATE	PROCEEDINGS
12-12-74	Filed Order that Horace Man Barnard School, La Salle Academy, Long Island Luthern High School, St. Michael School & Yeshivah Rambam are granted leave to Intervene in this action as a party deft. & that the proposed Answer of Intervenor-defts. heretofore served on all other parties be filed as the answer to pltffs. complaint & this action be amended to read as indicated. Ward J. (mailed notice)
2-18-75	Filed Pltffs. affidavit and notice of motion to convene 3 Judge Court. ret. 2/25/75.
2-28-75	Filed Memo. End. on motion dtd. 2/18/75. Motion granted. No Opposition. Settle Order on notice. Ward J. (mailed notice)
3-20-75	Filed Order that the motion to convene a 3 Judge Court pursuant to 28:2281, 2284 is granted. Ward J. (mailed notice)
4-10-75	Filed Affidavit of Service by Daniel F. Houlihan on 4/9/75.
4-10-75	Filed Responses of Intervenor Dft. La Salle Academy to Pltffs. interrogs.
4-10-75	Filed Responses of Intervenor Deft. Horace Mann Barnard School to Pltffs. interrogs.
4-10-75	Filed Responses of Intervenor Deft. Long Island Lutheran High School to Pltffs. Interrogs.
4-10-75	Filed Responses to Intervenor Deft. St. Michael School to Pltffs. Interrogs.
4-10-75	Filed Responses of Intervenor Deft. Yeshivah Rambam to Pltffs. Interrogs.
6-27-75	Filed Brief for Defts.

Docket Entries

DATE	PROCEEDINGS
6-27-75	Filed Answers to interrogs. by deft. Ewald B. Nyquist, as Commissioner of Education of State of New York.
7- 7-75	Filed Pltffs. Brief.
7-17-75	Filed Brief for Intervenor-Defendants, by Davis, Polk & Wardwell Attys for Intervenor Defts.
10-15-75	Filed Order designation of Judges—I hereby designate the following judges, Hon. Robert J. Ward, Hon. Walter R. Mansfield, USCA, & Lawrence W. Pierce & that this order be filed in the Southern District Court of NY. Kaufman Ch. J. of the USCA. (mailed notice)
3-11-76	Fld Order of Ch. J. Kaufman designating Judge Knapp to replace Judge Pierce to hear and determine this action. . . . Kaufman, Ch. J.
4- 1-76	Fld Order of Kaufman Ch. J. USCA. . . . Judge Lasker to serve in place and stead of Judge Knapp.
4-28-76	Fld Pltffs' Interrogs to Intervening defts.
4-28-76	Fld Pltffs' Interrogs to the defts.
5- 5-76	Filed transcript of record of proceedings dated 3-31-76
6-21-76	Fld Opinion from Three Judge Court #44613. . . . Accordingly, we hold that Chapter 507, as amended by Chapter 508, is unconstitutional to the ext that it authorized the allocation of funds to sectarian schools and we enjoin the application of the act to such schools . . . Settle Judgment on Notice. . . . Mansfield, C.J. & Lasker, J. and Ward, J. mn.
6-23-76	Filed transcript of record of proceedings dated 3-31-76

Docket Entries

DATE	PROCEEDINGS
7-26-76	Filed Judgment and Order of Three Judge Court —Ordered, Adjudged and Decreed, that That Chapter 507, as amended by Chapter 508, of 1974 Laws of New York is unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools, and defts. are hereby permanently enjoined from applying said Act to such Schools. Judge W.R. Mansfield, Judge M. Lasker, and Judge R.J. Ward. Judgment Entered Clerk—7-28-76 mn
8- 5-76	Fld Consent to Change Atty for an intervenor deft Yeshivah Rambam . . . from Polk & Wardwell Esqs. to the incoming atty Dennis Rapps . . . So Ordered Ward, J. mn
9-21-76	Filed notice of appeal to the Supreme Court of the U.S.A. by Intervenor-Deft Yeshivah Rambam, from the Three-Judge District Court judgment ent. 7-26-76, from each & every part of said judgment.
9-23-76	Filed notice of appeal to the Supreme Court of the United States, by intervenor defts (La Salle Academy, Long Island Lutheran High School & St. Michael School), from the Judgment entered on 7-28-76.
11- 1-76	Filed defts & intervenor-defts. (La Salle Academy, Long Island Lutheran High School, St. Michael School & Yeshivah Rambam) having filed notices of appeal to the Supreme Court of the United States from the Judgment of the Court it is Ordered that the Clerk of the Court is authorized & directed to transmit to the Clerk of the Supreme Court of the U.S. all the records filed in the office of the Clerk of this Court. Ward, J. N/M

Docket Entries

DATE	PROCEEDINGS
11- 9-76	Filed notice that record on appeal has been Certified & transmitted to the Supreme Court of the U.S.
8- 9-77	Filed True Copy of order from U.S. Supreme Court it is ordered and adjudged that the judgment of the said U.S. District Court in these causes be and the same is hereby vacated and that these causes be, and the same are hereby remanded to the U.S. District Court for the S.D.N.Y. for further consider action in light of Wolman v. Walter, . . . Clerk. U.S. Supreme Court Wash. D.C. m/n. (to ea.)
8-24-77	Filed Pltffs. affdvt. and notice of motion for an order granting a preliminary injunction enjoining & restraining the defts. Arthur Levitt, as Comptroller of the State of N.Y. and Ewald B. Nyquist as Commissioner of Education of the State of N.Y. pending the trial of the issues. Ret. 9-6-77.
8-24-77	Filed Pltffs' memorandum of law in support of motion for preliminary injunction.
9- 6-77	Filed Intervenor-Defts' Affidavit in opposition to pltffs' motion for preliminary injunction.
9- 6-77	Filed Intervenor Defts' Memorandum in opposition to Pltffs' motion for preliminary injunction.
9- 6-77	Filed Affidavit on behalf of Defts' Levitt & Nyquist.

Docket Entries

DATE	PROCEEDINGS
9-15-77	Filed Interim order (Three-Judge Court) Accordingly, it is ordered that during pendency of this lawsuit, any funds apportioned by the Commissioner of Education to any & all sectarian schools seeking reimbursement payments pursuant to Chapter 507, Etc. shall be paid to & held by the Comptroller of the State of N.Y. in escrow, subject to the condition that no further payments will be made by the Comptroller out of such funds to any sectarian school until a final decision is rendered on the merits of this lawsuit, or until further order of this court . . . Etc. & that the parties include with the stipulation of facts to be filed on or before 9-27-77, a precise description of the method used to compute the amounts apportioned to schools seeking payments under Chapter 507 . . . Etc. Mansfield, C.J.; Lasker, J.; Ward, J. m/n
9-27-77	Filed Stipulation of facts between parties.
9-29-77	Filed defts. affdvt. of Herbert D. Brum.
1-27-78	Filed Pltff. Affidavit of Service of memorandum of law.
1-27-78	Filed Pltffs' memorandum of law pursuant to interim order.
1-30-78	Filed Defts & Intervenor-defts Brief.
12- 2-77	Filed transcript of record of proceedings dated 9-12-77
12-12-78	Fld Three Judge Court's Opinion #47973. . . . For the foregoing reasons we conclude that Chapter 507, as amended, does not violate the Establishment Clause . . . Settle Judgment on notice. . . . Mansfield, C.J., Lasker DJ. . . . I dissent in a separate attached opinion. . . . Ward, J. mn

Docket Entries

DATE	PROCEEDINGS
12-20-78	Fld Judgment. . . . Ordered . . . that the complaint be & it hereby is, dismissed on the merits. . . . Mansfield, USDJ, Lasker, J., & Ward, J. . . . Judg. ent. 12-20-78. . . . Clerk mn
1-30-79	Fld State Defts' Order to show cause . . . why the judgment entered on 12-30-78 should not be resettled . . . etc. . . . Ret: 2-2-79 at 3:00 pm in room 519 before Judge Ward, J.
1-24-79	Fld Pltffs' Notice of appeal to the United States Supreme Court . . . from the Judgment entered in this action on 12-20-78 dismissing the complaint herein on the merits.
2- 1-79	Fld Intervenor's deft's memorandum in response to Order to Show cause
2- 2-79	Hearing begun & concluded motion for clarification of the Judgment. . . . Motion disposed of in accordance with oral decision rendered this day. Pltffs' to post bond in the sum of $5,000.00 within 10 days. . . . Settle order on notice. . . . (O & A)
2- 5-79	Fld memo-end on the back of State Deft's OSC Dated 1-30-79. . . . Motion disposed of in accordance with oral decision rendered this date. . . . Settle order on notice. . . . Ward, J. mn (O & A)
3- 7-79	Fld Bond in the am't of $5,000.00 for undertaking of the costs on appeal. . . . Bond #2524850 . . . National Surety Corp., Approved as to form & sufficiency Clerk

Docket Entries

DATE	PROCEEDINGS
3-12-79	Fld Order. . . . Ordered . . . that the escrow provision of the interim order is continued in full force & effect and no payment shall be made from the escrow fund for a reasonable period of time following entry of the Judgment of this court on 12-20-78 upon the following terms & conditions. . . . The reasonable period shall continue for a period of 60 days from 2-2-79 . . . the Comptroller shall maintain the escrow funds in an interest-bearing account for the benefit of the payee . . . The pltff shall post a cash bond in the am't of $5,000. . . . etc. . . . so ordered. . . . Mansfield, USCJ, Lasker, USDJ & Ward, USDJ mn
6-14-79	Filed transcript of record of proceedings dated 2-2-79.

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action 74 Civ. 2648

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs for a temporary and permanent injunction against the allocation and use of the funds of the State of New York to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in the practice, propagation and teaching of religion, and to

declare such use violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, United States Code, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202, and Title 42, Section 1983.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000) as more fully appears hereinafter.

4. Plaintiff Committee for Public Education and Religious Liberty (PEARL) is an association whose constituent members are: American Ethical Union; Americans for Democratic Action; Americans for Public Schools; American Jewish Committee, New York Chapter; American Jewish Congress; A. Philip Randolph Institute; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Bronx Park Community; Citizens Union of the City of New York; City Club of New York; Community Church of New York; Community Service Society, Committtee on Public Affairs; Council of Churches of the City of New York; Episcopal Diocese of L.I., Department of Christian Social Relations; Humanist Society of Greater New York; Jewish Reconstructionist Foundation; Jewish War Veterans, New York Department; League for Industrial Democracy, New York City Chapter; National Council of Jewish Women; National Women's Conference of American Ethical Union; New York Civil Liberties Union; New York Federation of Reform Synagogues; New York Jewish Labor Committee; New York Society for Ethical Culture; New York State Americans United for

Separation of Church and State; New York State Council of Churches; State Congress of Parents and Teachers, New York City District; Union of American Hebrew Congregations; Unitarian-Universalist Ministers Association of Metropolitan New York; United Community Teachers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; and Workmen's Circle, New York Division. The members of these organizations who reside in the State of New York are numerous and the organizational plaintiff and each of its constituent organizations carry on activities in the Southern District of New York. The organizational plaintiff and its constituents share as common objectives preservation of freedom of religion and the separation of church and state and opposition to the use of public funds for the support of sectarian or religious schools.

5. Each of the individual plaintiffs is a citizen of the United States. Each resides in the State of New York, and some reside in the Southern District of New York. Each of them pays income and various other taxes in and to the State of New York.

6. Defendant Arthur Levitt is the Comptroller of the State of New York and is sued herein in that capacity. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and is sued herein in that capacity.

II. Factual Allegations

7. On May 23, 1974, Governor Malcolm Wilson signed into law an act, Laws 1974, Chapter 507, entitled, "An Act to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data," and an act, Laws 1974, Chapter 508, entitled, "An Act to amend a chapter of the laws of nineteen hundred seventy-four, entitled 'An Act to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data', in relation to its applicability." (The text of the said Acts, hereinafter referred to as the Acts, is set forth herein as Appendix A and Appendix B, respectively.)

8. The sums appropriated by the State of New York to effectuate the Acts greatly exceed Ten Thousand Dollars ($10,000) annually.

9. The Acts on their face and as construed and applied by the defendants authorize and direct payments to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagatiou and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that

purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

10. It is against the religious conscience of each of the individual plaintiffs to be forced by the operation of the taxing power to contribute to the propagation of religion in general and to religions to which he does not adhere in particular, or for the support or maintenance of sectarian schools or places of worship.

11. The First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *."

III. Causes of Action

12. *First Count*: The Acts on their face and as construed and applied by the defendants, are laws respecting an establishment of religion in violation of the First Amendment of the United States Constitution in that they (a) constitute governmental financing and subsidizing of schools which are controlled by religious bodies, organized

for and engaged in the practice, propagation and teaching of religion, and of schools limiting or giving preference in admission and employment to persons of particular religious faiths; (b) constitute governmental action whose purpose and primary effect is to advance religion; (c) give rise to an excessive governmental involvement in and entanglement with religion; and (d) give rise to and intensify political fragmentation and divisiveness on religious lines.

13. *Second Count*: The Acts on their face and as construed and applied by the defendants, violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the individual plaintiffs by reason of the fact that they constitute compulsory taxation for the support of religion or religious schools.

IV. Other Allegations

14. This suit involves a genuine case or controversy between the plaintiffs and defendants.

15. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

V. Prayers for Relief

16. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code, to declare unconstitutional and enjoin the enforcement of the Acts, as hereinbefore set forth.

(2) That the defendants and each of them be enjoined from approving or paying any funds of the State of New York to schools owned or controlled by religious bodies or organized for or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid Acts or otherwise.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief sought herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

June 20, 1974.

/s/ Leo Pfeffer

Leo Pfeffer
Attorney for Plaintiffs
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15 East 84th Street
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Answer

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

The defendants, Arthur Levitt and Ewald B. Nyquist, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for their answer to the complaint herein:

1. Admit the allegations contained in paragraphs 6, 7, 8, 11 and 14 of the complaint herein.

Answer

2. Deny each and every allegation contained in paragraphs 3, 12, 13 and 15 of the complaint herein.

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 4, 5 and 10 of the complaint herein.

4. As to the allegations contained in paragraph 1 of the complaint herein, admit that those allegations are the stated bases for the action herein and state the claims of the plaintiffs herein, but deny any conclusions as to the validity of those allegations and claims which might be drawn from those allegations.

5. As to the allegations contained in paragraph 2 of the complaint herein, admit that the jurisdiction of this Court is invoked in this action as stated therein, but deny any conclusions as to the validity of the claims in such actions which might be drawn from those allegations.

6. As to the allegations contained in paragraph 9 of the complaint herein, allege that the acts provide for payments to nonpublic schools which meet certain criteria, none of which relate to the teaching of religion or the religion of the students or faculty, or the religious affiliation of the schools. To the extent that paragraph 9 infers that the criteria listed in it constitute statutory or administrative requirements or considerations in the administration of the act, it is denied.

7. As to the allegations contained in paragraph 16 of the complaint herein, deny that Chapters 507 and 508 of the

Laws of 1974 are unconstitutional and further deny that plaintiffs are entitled to any or all of the relief requested therein, or to any other relief.

For a Separate and Distinct Defense to the Complaint Herein, Defendants Allege:

8. Chapters 507 and 508 of the Laws of 1974 provide for State reimbursement to nonpublic schools for the costs of administering State prepared examinations and maintaining and reporting on pupil attendance and other matters as required by the State.

9. The Supreme Court of the United States has held that states may provide nonideological services to nonpublic school pupils. The State of New York requires certain tests to be administered and information collected to assure that all schools, public and private, meet certain minimum standards of curriculum taught and faculty and requires all schools in the State of New York to participate in this testing and evaluation program. Public schools are compensated for this service through State aid payments. Nonpublic schools will be compensated as provided in these acts.

10. The Supreme Court of the United States held a similar earlier state statute invalid under the First Amendment because it included reimbursement for the costs of administering teacher prepared tests and held that because reimbursement was provided by a lump sum per pupil the whole statute had to be invalid because the permissible

reimbursement could not be separated out from the lump sum payment (*Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472). This statute eliminates reimbursement for teacher prepared tests and provides only for reimbursement of actual costs, thus overcoming the elements found unconstitutional in the prior statute.

WHEREFORE, the defendants pray that judgment be granted holding Chapters 507 and 508 of the Laws of 1974 constitutional, denying the injunctive relief requested in the complaint, and that defendants be granted such other and further relief as the Court may deem just and proper.

July 16, 1974

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

By JEAN M. COON

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Answer of Intervenor-Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

Intervenor-defendants Horace Mann-Barnard School, La Salle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam, by their attorneys, Davis Polk & Wardwell, on their own behalf and on behalf of all other schools similarly situated in the State of New York, for their answer to the complaint herein:

Answer of Intervenor-Defendants

1. Deny paragraph 1, except admit that this is a civil action, that it is purportedly brought on behalf of the plaintiffs named in the complaint and that it seeks preliminary and permanent injunctions.

2. Deny paragraphs 2 and 3.

3. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraphs 4 and 5.

4. Admit paragraphs 6 and 7.

Exhibit A

5. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraph 8.

6. Deny paragraph 9.

7. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraph 10.

8. Admit paragraph 11.

9. Deny paragraphs 12, 13, 14 and 15.

First Affirmative Defense

10. This court lacks jurisdiction over the subject matter of this action.

Second Affirmative Defense

11. The complaint fails to state a claim upon which relief can be granted.

Third Affirmative Defense

12. Plaintiffs' action seeks relief in violation of the right to the free exercise of religion, as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Constitution of the State of New York.

Fourth Affirmative Defense

13. Plaintiffs' action seeks relief in violation of the right to the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Constitution of the State of New York.

Fifth Affirmative Defense

14. Plaintiffs' action seeks to deprive intervenor-defendants of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the Constitution of the State of New York.

WHEREFORE, intervenor-defendants demand judgment dismissing plaintiffs' complaint and granting to said intervenor-defendants such other and further relief as may be just.

Dated: New York, New York
November 12, 1974

DAVIS POLK & WARDWELL

By RICHARD E. NOLAN

A Member of the Firm
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Stipulation of Facts

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, attorneys for all of the parties hereto, as follows:

Stipulation of Facts

1. Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York* became law on May 23, 1974.

2. On June 20, 1974, the complaint was filed herein, seeking a declaratory judgment that Chapter 507 is unconstitutional and a permanent injunction against its enforcement.

3. On December 11, 1974, Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam, all of which are nonprofit, nonpublic schools located within the State of New York, were granted leave to intervene in this action as parties defendant.

4. For purposes of this action, the intervenor-defendants may be considered typical of, but not identical with, other nonpublic schools in the State of New York.

5. Each of the intervenor-defendants has performed services for which reimbursement is provided pursuant to Chapter 507.

6. Each of the intervenor-defendants has duly applied for apportionments from the State of New York pursuant to Chapter 507 for the school years 1973-74, 1974-75 and 1975-76. To date, each of the intervenor-defendants has received apportionments for the first two of these school years, namely, 1973-74 and 1974-75.

* Hereinafter referred to as "Chapter 507".

7. The plaintiffs served written interrogatories upon the defendants and upon the intervenor-defendants which were responded to by defendant Nyquist on February 7, 1975 and by each of the intervenor-defendants on April 9, 1975.

8. The interrogatory responses and exhibits thereto of defendant Nyquist and of each of the intervenor-defendants have been filed with the Clerk of the Court and are a part of the record herein.

9. On March 19, 1975, the plaintiffs' motion to convene a three-judge district court was granted pursuant to 28 U.S.C. §§2281, 2284.

10. The three-judge court entered a judgment herein on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools."

11. On June 27, 1977, the United States Supreme Court vacated the three-judge court's judgment of July 28, 1976 and remanded the case for reconsideration in light of the decision in *Wolman* v. *Walter,* 433 U.S. ——, 97 S.Ct. 2593 (1977).

12. On September 12, 1977, the three-judge court held a hearing on the plaintiffs' application for a preliminary injunction against enforcement of Chapter 507 "pending the trial of the issues herein."

13. On September 15, 1977, the three-judge court filed an Interim Order, among other things ordering that

> the parties in this case promptly endeavor to prepare and will, on or before September 27, 1977, file with this

> court a stipulation of facts describing the actual services rendered by personnel in non-public schools for which reimbursement under Chapter 507 is available, including the actual duties that are or would be performed by such personnel with regard to compliance with New York's pupil evaluation program, the basic educational data system, Regents' examinations, statewide evaluation plan, uniform procedure for pupil attendance reporting, and any other similar state prepared examinations and reporting procedures, the costs of which are reimbursable under Chapter 507. With regard to any examinations which may be graded by non-public school personnel, information shall be supplied specifying whether any review of such grading is performed by the State and, if so, the nature of such review. Wherever possible, copies of typical examinations, tests or other documents used in complying with pertinent New York State testing, evaluation and reporting requirements should be furnished to this court;

and further ordering that

> the parties include with the stipulation of facts to be filed on or before September 27, 1977, a precise description of the method used to compute the amounts apportioned to schools seeking payments under Chapter 507. Information should also be supplied regarding any restrictions imposed on the use of such payments by the schools following their receipt.

14. A number of standardized tests are provided by the Education Department to help improve the educational program offered in the schools of the State of New York. All tests and accessories are offered at no charge.

15. The Education Department has established a statewide Pupil Evaluation Program (PEP), a full testing program required of all pupils in grades 3 and 6 in the public and nonpublic schools in New York State. Tests for pupils in Grade 9 are also available for schools that wish to use them on an optional basis. The tests used in the program are standardized reading and mathematics achievement tests developed and published by the Education Department and based on New York State courses of study:

Grade	*Name of Test**	*No. of Questions*	*Testing Time in Minutes*	*Type of Scoring*
3	New York State Test in Reading—Beginning Grade 3—Form C	50	45	Hand or Machine
3	Mathematics Test for New York State Elementary Schools—Beginning Grade 3—Form C	60	50	Hand or Machine
	Pt. 1. Concepts	(26)	(20)	
	Pt. 2. Computation	(16)	(12)	
	Pt. 3. Problem Solving	(18)	(18)	
6	New York State Test in Reading—Beginning Grade 6—Form C	50	50	Hand or Machine

* Samples of the Third and Sixth Grade tests and their scoring keys are appended hereto as Exhibits 1 through 8, respectively. Samples of the Ninth Grade tests and their instruction manuals and scoring keys are appended hereto as Exhibits 9 through 14.

Grade	*Name of Test*	*No. of Questions*	*Testing Time in Minutes*	*Type of Scoring*
6	Mathematics Test for New York State Elementary Schools—Beginning Grade 6—Form C	67	60	Hand or Machine
	Pt. 1. Concepts	(27)	(20)	
	Pt. 2. Computation	(20)	(20)	
	Pt. 3. Problem Solving	(20)	(20)	
9	New York State Test in Reading—Beginning Grade 9—Form A	50	50	Hand or Machine
9	New York State Test in Mathematics—Beginning Grade 9—Form A	80	60	Hand or Machine
	Pt. 1. Concepts	(32)	(18)	
	Pt. 2. Skills	(24)	(16)	
	Pt. 3. Problem Solving	(24)	(26)	

The Education Department sends order forms for test materials to each school administrator or principal, who fills out and returns the order forms to the Department. The Department ships the test materials and the score report forms directly to the schools according to directions on the order forms. The schools administer and score the tests, fill out the score report forms, and return them to the Department.

Schools prepare frequency distributions of the scores of their pupils and report these distributions to the State Education Department on Optical Scanning report forms.* The distributions of scores are processed by computer, and several reports which summarize the results in conveniently interpretable form are returned to each school and central office. A copy of each report is kept on file in the Education Department, and, in addition, the Department prepares a statewide annual summary report which highlights trends and needs in various types of schools and communities throughout the state.

The reports sent to schools and school-system central offices are as follows:

*Name of Report***	*Distribution*
1. School Testing Report A. School Summary Table B. Total Score Distribution Tables	Copies to both the school and the central office
2. Five-Year Summary Report	Copies to both the school and the central office
3. Five-or-More School Buildings Report	Copy to central office only
4. Performance Indicators in Education (PIE) Report	Copy to central office only

* Samples of these reports are appended hereto as Exhibits 15, 16 and 17.

** Samples of these reports are appended hereto as Exhibits 18 through 21, respectively.

16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials; proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

17. Nonpublic schools are required to file by a specific date each year a Basic Educational Data System (BEDS) Report of Nonpublic Schools with the Bureau of Educational Data Systems of the State Education Department. A sample of such a report is appended hereto as Exhibit 22, and a sample of the Instruction Manual is appended hereto as Exhibit 23.

18. Nonpublic-school personnel perform the following services in regard to BEDS reports: collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report.

19. Regents examinations are end-of-course comprehensive achievement tests based on State courses of study for use in grades 9-12. They are prepared by the Education Department and may be administered only at official centers within the State of New York. The official centers include (1) all registered secondary schools and (2) other educational institutions which have been given specific approval to administer Regents examinations.

Regents examinations are provided presently in 19 subjects: Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science; English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish. Samples of the June 1977 Regents examinations in Biology, English and Tenth year mathematics and their scoring keys are appended hereto as Exhibits 24 through 29, respectively.

The school principal or chief administrative officer of the examination center is responsible for the enforcement of the regulations for administering Regents examinations.

Order forms for both examination booklets and scoring keys are mailed to schools well in advance of the examination periods. Complete instructions and an examination schedule are enclosed with the order forms. Orders must be returned by the date specified in the instructions.

Examination booklets are shipped directly to schools so as to arrive a few days prior to the start of the Regents examination period. The booklets are shipped in locked metal boxes, and the padlock keys are sent to the principal by first-class mail.

Generally, scoring keys are not shipped with the examination booklets; rather, they are sent to a regional center for release after the uniform statewide admission deadline for each examination. Schools must arrange to pick up scoring keys from the regional center which they designate on their order forms.

The principal must keep the examination materials in a fireproof and burglarproof safe or vault. A locked

closet is not adequate. If possible, the materials are kept in the locked metal box in which they were received. Box keys and vault combinations must be maintained under strict security conditions to preclude access to the examination materials by students and other unauthorized persons. All school building personnel who may receive the Regents examination shipment, either during or after regular school hours, must be informed by the principal concerning the security procedures to be followed.

If a safe or vault is not available in the school, the principal must make arrangements to store the examination materials in the vault of a bank or in the vault of another school, school district building or BOCES. If such arrangements cannot be made, it is the responsibility of the principal to notify the Bureau of Elementary and Secondary Educational Testing so the examination materials can be sent to an appropriate storage facility.

Each teacher or deputy employed in the conduct of Regents examinations must read with care, prior to the examination date, the appropriate sections of the Regents Examination Manual.* All proctors must enforce the regulations in every particular.

The principal is responsible for the rating of all papers written in the school. He is required to establish rating and checking procedures that will assure reasonable confidence in the accuracy of the ratings assigned to the examination papers.

To assist teachers in properly rating Regents examinations, the Education Department makes rating guides

* A sample is appended hereto as Exhibit 30.

available, a sample of one of which is appended hereto as Exhibit 31.

At the conclusion of each examination period, the Education Department asks each school to submit for review both the passing and the failing papers written in certain subjects. In March/April and in August, schools are asked to return papers in all subjects. In January and June, a random sampling procedure is used so that the subjects selected will vary from school to school and from year to year. Under this sampling procedure, every paper written in a school is equally likely to be selected regardless of which papers may have been reviewed in previous years.

Principals are required to make the necessary arrangements to have requested papers shipped promptly to the Department in the Regents box. Only the papers in subjects requested for review are submitted. All papers not requested to be sent in for Department review must be retained in the school files for at least one year. Any or all of these papers may be called for official review during this period.

The Regents examination papers submitted by each school are very carefully reviewed at the Department by a special group of experienced classroom teachers, under the supervision of the Department staff. Apparent discrepancies or errors in school ratings are called to the attention of the principal.

Every principal who orders Regents examinations must submit a Regents Examination Report.* The information required in the report includes, in addition to the number of

* A sample is appended hereto as Exhibit 32.

Regents examination papers written and the number passing in each subject, the total enrollment in each subject for which a Regents examination is offered. Every Regents examination administered, for whatever purpose, shall be included in the Regents Examination Report.

The principal must certify on this report that the rules and regulations for administering Regents examinations were faithfully observed. And each deputy and proctor must certify, by individually signing a certificate, that the rules and regulations for administering Regents examinations were faithfully observed. A sample Deputy and Proctor Certificate is appended hereto as Exhibit 33.

20. Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collection of materials; proctoring of examinations; scoring of the examinations; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

21. The "statewide evaluation plan" referred to in Section 3 of Chapter 507 has not yet been implemented by the Education Department, and no nonpublic school has sought reimbursement for compliance therewith.

22. Section 3211 of the New York Education Law provides, in part:

> Records of attendance upon instruction
>
> 1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction, or any other school district employee as may be designated by the commissioner of education under section three thousand twenty-four of this chapter, shall keep an accurate record of the attendance and absence of such minor. Such record shall be in such form as may be prescribed by the commissioner of education. . . .
>
> 3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of the records of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.
>
> 4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends, as provided by part one of this article, shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. He shall give prompt notification in writing to the school authorities of the city or district of the discharge or transfer of any such minor from attendance upon instruction, stating the date of the discharge, its cause, the name of the minor, his date of birth, his place of residence prior to and following discharge, if such place of residence be known, and the name of the person in parental relation to the minor.

23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N was appended as Exhibit 6 to defenadnt Nyquist's responses to the plaintiffs' interrogatories, and a sample is appended hereto as Exhibit 34.

24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports; recording of attendance on record forms prepared to meet State specifications*; ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers.

25. The Regents Scholarship and College Qaulification Test (RSCQT) has been used as the competitive examination in awarding Regents scholarships to high school graduates residing in New York State.** In addition, the RSCQT has been used as one of the required admissions

* A sample of a State-approved Register of Attendance which nonpublic schools purchase for this purpose is submitted herewith as Exhibit 35.

** For the first time, during the present school year (1977-78), a different testing program will be used.

tests for the various units of the State University. On a broader scale, the results of the RSCQT have been used by guidance counselers to assist high school seniors seeking admissions to colleges throughout the State and country.

A new examination was prepared each year and administered in late September or early October in approved high schools of the State, under the supervision of their principals. The answer papers have been scored at the State Education Department, with the score reports sent to the schools in December.

Three different types of Regents scholarships have been awarded: the Regents college scholarship, the Regents professional education in nursing scholarship, and the Regents scholarship for Cornell University. All scholarships are limited to full-time study in approved programs situated in New York State. No assistance can be received for theological study.

The RSCQT has been divided into two parts, Part 1 administered in the morning and Part 2 in the afternoon.*

Part 1 has been a test of general scholastic aptitude, containing questions intended to measure ability to think clearly and accurately. Candidates have been required to demonstrate capacity to perceive relationships, to reason logically and to solve problems. The questions have not been directly related to the subject matter of courses studied but depend rather upon general capacity to undertake college-level work successfully. Part 2 has been a test of subject matter achievement directly related to courses studied in high school.

* For a description of the RSCQT, see Exhibit 36 hereto.

To provide a general picture of the scope of the RSCQT, the subtests are indicated below, together with the approximate number of questions and credits assigned to each. Each question is worth one credit.

Part 1: General scholastic aptitude	150
Same-opposite	30
Verbal analogy	40
Sentence completion	30
Arithmetic reasoning	50
Part 2: Subject matter achievement	150
English	40
Social studies	40
Art and music	10
Science (general science and biology)	30
Mathematics (through 10th year mathematics)	30
Total	300

Each March, principals of approved high schools in New York State have been requested to order, on forms provided at that time, all materials for the examination scheduled for the following fall.

The regulations and procedures for administering the RSCQT were generally comparable to those for administering Regents examinations. However, there were important differences due particularly to the competitive nature of the examination. The question booklet had to be held secure at all times, after the examination as well as before. This meant that all question booklets, both used and unused, had to be returned to the Department immediately following the examination and that only scholarship candidates were

permitted access to the content of the booklets during the examination.

Copies of the RSCQT Administration Manual* have been distributed prior to each examination period. This manual contained detailed instructions for administering the examination, including instructions to be read verbatim to candidates. Each principal and proctor has been required to read the examination manual and to become thoroughly familiar with the examination procedure well in advance of the examination date.

26. Optional State high school achievement examinations,** basic competency tests,*** and New York State standardized tests in Grade 6 science, 7th and 8th Grade mathematics**** and in physical fitness, Grades 4-12 are administered by nonpublic-school personnel in nonpublic schools. When administered, the services performed by such personnel are prescribed by the respective Department of Education test materials and instructions.

27. By October 15th of each year, secondary nonpublic schools are required to file a Secondary School Report with the Education Department. A sample of such a report is appended hereto as Exhibit 55.

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* A sample is appended hereto as Exhibit 37. Nonpublic-school personnel performed the services specified therein.

** Samples and their scoring keys are appended hereto as Exhibits 38 through 41.

*** Samples and their instructions and scoring keys are appended hereto as Exhibits 42 through 48.

**** Samples and their direction manuals and scoring keys are appended hereto as Exhibits 49 through 54, respectively.

28. In filing Secondary School Reports, nonpublic-school personnel perform the same tasks as are performed in regard to the BEDS reports, as specified in paragraph 18 above.

29. Section 176.2 of the Regulations of the Commissioner of Education provides:

> Application for apportionment and required accounting records.
>
> (a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner of Education.
>
> (b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:
>
> (1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include accounts for salaries, supplies and materials, contractual expenses and fringe benefits.
>
> (2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.
>
> (3) An individual salary record for each employee involved in providing services for which ap-

portionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.

(4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

30. The responses to the plaintiffs' interrogatories filed herein each contained copies of State Education Department Forms SA-186 and SA-187. These forms show precisely the method used to compute the amounts apportioned to the intervenor-defendants under Chapter 507 for the school year 1974-75. They are appended hereto as Exhibits 56 through 60 and are referred to for the contents thereof.

31. Chapter 507 restricts apportionments to the actual costs incurred by nonpublic schools in performing the specified required services. These costs are calculated pursuant to the Forms SA-186 and SA-187 and are reimbursed during the succeeding school year when nonpublic schools are incurring similar costs anew. As a rule, apportionments received pursuant to Chapter 507 are placed in general accounts and cease to be identifiable as to disbursement.

Dated: New York, New York
September 26, 1977

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE SCHOOLS TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rule

IN THE

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No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE SCHOOLS TO DISMISS OR AFFIRM

Appellees Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam move pursuant to Rule 16 of the Rules of this Court to dismiss this appeal as not presenting a substantial federal question or, in the alternative, to affirm the judgment appealed from.

Opinions Below

The opinions in the three-judge district court, upon which the judgment appealed from is based and which are set forth in Appendices A and B to appellants' Jurisdictional Statement, are reported at 461 F.Supp. 1123 *et seq.*

Question Presented

Whether reimbursement of nonpublic schools for actual costs incurred by them in administering standardized state-prepared examinations and in compiling attendance and other reports for the State of New York presents a substantial federal question in light of *Wolman v. Walter,* 433 U.S. 229 (1977), and *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. 472 (1973).

Statement of the Case

On June 27, 1977, this Court vacated the district court's injunction of July 26, 1976 against enforcement of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York[1] and remanded for reconsideration in light of

[1] Hereinafter referred to as "Chapter 507", the full text of which is set forth in Appendix E to appellants' Jurisdictional Statement.

Wolman v. Walter, 433 U.S. 229 (1977). *Levitt v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-595) and *LaSalle Academy v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-713), 433 U.S. 902 (1977).

Upon reconsideration, on December 11, 1978, the three-judge district court held that Chapter 507 "does not violate the Establishment Clause",[2] Judge Ward dissenting. Judgment was entered on December 20, 1978, dismissing the complaint on the merits.[3]

After remand, all of the parties to the action entered into a Stipulation of Facts, incorporating samples of the standardized state-mandated and prepared examinations, scoring guides, attendance reporting form and other materials involved under Chapter 507. A copy of this Stipulation is appended to this motion, and a set of the exhibits thereto is being filed herewith in the Office of the Clerk of this Court for ready reference.

The Stipulation of Facts demonstrated the wholly ministerial nature of the services performed by the nonpublic schools, the actual costs of which are reimbursed pursuant to Chapter 507. The Stipulation further demonstrated that audits performed under Section 7 of this statute not entail any involvement between church and state.

Paragraph 20 stipulated, for example:

> Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering

[2] 461 F.Supp. at 1131.

[3] A copy of the judgment is set forth in Appendix C to appellants' Jurisdictional Statement.

> and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collection of materials; proctoring of examinations; scoring of the examination; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

Exhibit 33 was a sample Deputy and Proctor Certificate which must be signed by each person "who assisted in the administration of Regents examinations", declaring that he or she "fully and faithfully observed" the rules and regulations of those examinations.[4]

The extensive Regents rules and regulations, set forth in Exhibit 30, and the sample Regents examinations in biology (Exhibit 24), English (Exhibit 26) and tenth year mathematics (Exhibit 28) and their state-prescribed scoring keys[5] (Exhibits 25, 27 and 29, respectively) do not leave room for proselytizing. In fact, most of the tests can be graded by machine. Hence, as the answers to the plaintiffs' interrogatories showed, LaSalle Academy expended only $119 administering Regents examinations in 1973-74, and neither of the other two larger intervenor-defendant high schools spent as much as $500.

[4] The school principal must thereafter also certify compliance on Exhibit 32.

[5] Exhibit 31 was a sample of the type of rating guide which also accompanies Regents exams.

The Stipulation of Facts provided as follows in regard to attendance-taking:

> . . . 23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N . . . is . . . Exhibit 34.
>
> 24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports; recording of attendance on record forms prepared to meet State specifications; ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers. (footnote omitted)

And, as is true with the standardized tests, the state-approved Register of Attendance (Exhibit 35) does not leave any room for religious input.

Based upon such a clear and concise record, the district court found that:

> The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this ser-

vice. However, the total amount paid for these attendance-taking services amounted to only approximately 1% to 5.4% of the total amount budgeted by the schools for salaries and fringe benefits. 461 F.Supp. at 1126.

With regard to the state examinations and scoring services, the district court found the risk of their "being diverted to religious purposes . . . altogether too insubstantial to require a departure from *Wolman*" [*]:

> . . . The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services.
>
> . . . The tests administered under the Pupil Evaluation Program (PEP) consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State.
>
> Similarly, the overwhelming majority of the questions on the comprehensive achievement tests consist of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination. Although some of the comprehensive achievement examinations may,

[*] 461 F.Supp. at 1128.

> among scores of multiple-choice questions, have a question asking students to write an essay on one of several topics specified in the exam, which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and to grade the answer accordingly, the likelihood of such an event is so minimal and the State procedures designed to guard against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Levitt I, supra,* 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures (described above) provide an adequate check against any misuse of essay questions.
>
> In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. As the Supreme Court pointed out in [*Comm. for Pub. Educ. & Religious Liberty v.*] *Nyquist,* . . . 413 U.S. [756,] 771, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is for that reason alone, constitutionally invalid." In the absence of some other potential for diversion we fail to find the possible indirect benefit from this feature of the Statute sufficient to warrant its nullification. 461 F.Supp. at 1128-29 (footnote omitted).

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

The sole question presented by this appeal is whether continued enforcement of Chapter 507 presents a substantial federal question in light of *Wolman v. Walter,* 433 U.S. 229 (1977), and *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. 472 (1973). The district court concluded that no such question is, in fact, presented, and the complaint was ordered dismissed.

The district court reasoned that *"Wolman* . . . must be viewed as rejecting the concept that State support for educational activities necessarily advances religion."[7] Further:

> . . . [T]here does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams. 461 F.Supp. at 1129.

[7] 461 F. Supp. at 1128. In *Wolman,* eleven of twelve provisions of Section 3317.06 of the Ohio Revised Code (1976) were challenged as unconstitutional. This Court sustained the constitutionality of eight of them, namely, subsections A (textbooks), D (speech-hearing services), F (diagnostic psychological services), G (therapeutic psychological services), H (guidance counseling), I (remedial services), J (standardized testing) and K (services for handicapped children).

Subsections B and C, providing for instructional materials and equipment, and L, providing for field trips, were held to be unconstitutional. Subsection E, providing for medical services, was not challenged.

And, with respect to reimbursement for the maintenance of attendance records:[8]

> . . . [S]ince record-keeping is essentially a ministerial task lacking ideological content or use, it is not challengeable on *Meek's* theory that any state assistance to the educational process advances religion. 461 F. Supp. at 1130.

The district court's conclusions are well-founded. This Court has repeatedly rejected claims that otherwise permissible programs are invalid because they involve a financial payment which may also involve an indirect or incidental benefit to religious ends. For example, in *Tilton v. Richardson,* 403 U.S. 672 (1971), Chief Justice Burger stated in his lead opinion:

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts,* 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. 403 U.S. at 679.

In *Hunt v. McNair,* 413 U.S. 734 (1973), Mr. Justice Powell pointed out that

[8] These records (*see* Exhibit 35 to the Stipulation of Facts) are maintained on a daily basis, reflecting pupil attendance during the day, rather than at specific classes. In view of the requirements as to secular subjects required to be taught in New York's nonpublic schools, any benefit accruing because of a pupil's attendance at a religion class in the course of a day principally devoted to secular subjects is surely incidental to the recognized need to maintain such attendance records for clearly secular purposes. *Cf.* N.Y. Educ. Law § 3204.

> the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. 413 U.S. at 743.

In *Meek v. Pittenger,* 421 U.S. 349 (1975), Mr. Justice Stewart again reminded us that

> it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. 421 U.S. at 359.

And in *New York v. Cathedral Academy,* 434 U.S. 125 (1977), Mr. Justice Stewart stated the matter as follows:

> . . . [T]his Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aid to religious institutions . . . .[9]

In sum, the fact that payments are authorized under Chapter 507 does not require a finding that they are violative of the First Amendment. Certainly, after *Wolman,* there should not be any claim that non-ideological state-required programs such as the maintenance of attendance records or the use of standardized state-prepared examinations in nonpublic schools offend the Establishment Clause, nor should there be any claim that use of public funds in support thereof is unconstitutional.

In *Wolman,* this Court sustained the constitutionality of subsection J of the Ohio statute, providing for state purchase of standardized tests and scoring services used in nonpublic schools, as follows:

---

[9] 434 U.S. at 134, citing *Roemer v. Bd. of Pub. Works of Maryland,* 426 U.S. 736, 747 n.14 (1976).

In *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction." *Id.,* at 480.

There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.,* at 479-480, n.7. The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, *Allen,* 392 U.S., at 245-246, and n.7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt,* 413 U.S., at 479-480, n.7; *Lemon,* 403 U.S., at 614. See App. 28. Cf. *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt.* Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that §3317.06(J) is constitutional. 433 U.S. at 239-41 (footnote omitted) (Blackmun, J.).

It is precisely the infirmity in *Levitt* referred to, namely, reimbursement of the costs of internally-prepared examinations, which has been remedied by Chapter 507.

Having concluded that Chapter 507 does not advance religion, the district court concluded that the activities reimbursed by the statute "do not pose any substantial risk of . . . entanglement". 461 F.Supp. at 1130 (footnote omitted).

Appellants contend in their Jurisdictional Statement that Chapter 507 fosters an excessive government entanglement with religion, and they seek support in *New York v. Cathedral Academy, supra,* but that case is not relevant here.

Cathedral Academy involved an effort by the New York Legislature to correct an inequity it found to exist as a result of the timing of the entry of the judgment in *Comm. for Pub. Educ. & Religious Liberty v. Levitt,* 342 F.Supp. 439 (S.D.N.Y. 1972), *aff'd,* 413 U.S. 472 (1973). In enacting Chapter 996 of the 1972 Laws of New York, the Legislature had incorporated verbatim the operative language of the so-called Mandated Services Act,[10] the enforcement of which had been permanently enjoined.

This critical factor was clearly recognized by Mr. Justice Stewart in *Cathedral Academy,* just as Mr. Justice Blackmun clearly recognized in *Wolman,* as quoted above, the precise infirmity which had led the Court in *Levitt* to conclude that the Mandated Services Act was unconstitutional. The Court's opinion in *Cathedral Academy* reads, in pertinent part, as follows:

> . . . The New York statute was held to be constitutionally invalid because "the aid that [would] be devoted to secular functions [was] not identifiable and separable from aid to sectarian activities." *Levitt v. Committee for Public Education,* 413 U.S., at 480. This was so both because there was no assurance that the lump-sum payments reflected actual expenditures for mandated services, and because there was an impermissible risk of religious indoctrination inherent in some of the required services themselves. We noted in particular the "substantial risk that . . . examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Ibid.* Thus it can hardly be doubted that if ch. 996 authorizes payments for the identical services that were to be reimbursed under ch. 138, it is for the identical reasons invalid. 434 U.S. at 131.

Stated another way, the constitutional infirmity in Chapter 138, namely, reimbursement of expenses incurred in administering teacher-prepared exams, was retained in Chapter 996, thereby also retaining either the same potential advancement of religion through such exams or the same potential entanglement of the State with nonpublic schools in determining the content of those exams. *See New York v. Cathedral Academy,* 434 U.S. at 133.

Chapter 507 has remedied this infirmity by eliminating any reimbursement of expenses incurred in administering teacher-prepared exams and by restricting any testing re-

[10] [1970] Laws of N.Y. ch. 138.

imbursement to the actual costs of administering the standardized state-prepared examinations.

With regard to the procedures prescribed by Chapter 507 to audit the actual costs, this Court stated in *Wolman*:

> . . . [T]he inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. 433 U.S. at 240-41 (Blackmun, J.).

In *Levitt*, this Court was careful to indicate that actual costs incurred in performing secular services are reimbursable. It stated:

> We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function.
>
> Accordingly, the judgment of the District Court is affirmed. 413 U.S. at 482.

Chapter 507 is the result of the Legislature's adherence to this Court's teaching in *Levitt*.

Conclusion

In view of the foregoing, this appeal should be dismissed since it does not present a substantial federal question or, in the alternative, the judgment appealed from should be affirmed.

Dated: April 6, 1979

Respectfully submitted,

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APPENDIX

Stipulation of Facts

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, attorneys for all of the parties hereto, as follows:

1. Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York[1] became law on May 23, 1974.

[1] Hereinafter referred to as "Chapter 507".

2. On June 20, 1974, the complaint was filed herein, seeking a declaratory judgment that Chapter 507 is unconstitutional and a permanent injunction against its enforcement.

3. On December 11, 1974, Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam, all of which are nonprofit, nonpublic schools located within the State of New York, were granted leave to intervene in this action as parties defendant.

4. For purposes of this action, the intervenor-defendants may be considered typical of, but not identical with, other nonpublic schools in the State of New York.

5. Each of the intervenor-defendants has performed services for which reimbursement is provided pursuant to Chapter 507.

6. Each of the intervenor-defendants has duly applied for apportionments from the State of New York pursuant to Chapter 507 for the school years 1973-74, 1974-75 and 1975-76. To date, each of the intervenor-defendants has received apportionments for the first two of these school years, namely, 1973-74 and 1974-75.

7. The plaintiffs served written interrogatories upon the defendants and upon the intervenor-defendants which were responded to by defendant Nyquist on February 7, 1975 and by each of the intervenor-defendants on April 9, 1975.

8. The interrogatory responses and exhibits thereto of defendant Nyquist and of each of the intervenor-defendants

have been filed with the Clerk of the Court and are a part of the record herein.

9. On March 19, 1975, the plaintiffs' motion to convene a three-judge district court was granted pursuant to 28 U.S.C. §§2281, 2284.

10. The three-judge court entered a judgment herein on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools".

11. On June 27, 1977, the United States Supreme Court vacated the three-judge court's judgment of July 28, 1976 and remanded the case for reconsideration in light of the decision in *Wolman v. Walter*, 433 U.S. ——, 97 S.Ct. 2593 (1977).

12. On September 12, 1977, the three-judge court held a hearing on the plaintiffs' application for a preliminary injunction against enforcement of Chapter 507 "pending the trial of the issues herein".

13. On September 15, 1977, the three-judge court filed an Interim Order, among other things ordering that

> the parties in this case promptly endeavor to prepare and will, on or before September 27, 1977, file with this court a stipulation of facts describing the actual services rendered by personnel in non-public schools for which reimbursement under Chapter 507 is available, including the actual duties that are or would be performed by such personnel with regard to compliance with New York's pupil evaluation program, the basic educational data system, Regents' examinations, statewide evaluation plan, uniform procedure for pupil

attendance reporting, and any other similar state prepared examinations and reporting procedures, the costs of which are reimbursable under Chapter 507. With regard to any examinations which may be graded by non-public school personnel, information shall be supplied specifying whether any review of such grading is performed by the State and, if so, the nature of such review. Wherever possible, copies of typical examinations, tests or other documents used in complying with pertinent New York State testing, evaluation and reporting requirements should be furnished to this court;

and further ordering that

the parties include with the stipulation of facts to be filed on or before September 27, 1977, a precise description of the method used to compute the amounts apportioned to schools seeking payments under Chapter 507. Information should also be supplied regarding any restrictions imposed on the use of such payments by the schools following their receipt.

14. A number of standardized tests are provided by the Education Department to help improve the educational program offered in the schools of the State of New York. All tests and accessories are offered at no charge.

15. The Education Department has established a statewide Pupil Evaluation Program (PEP), a full testing program required of all pupils in grades 3 and 6 in the public and nonpublic schools in New York State. Tests for pupils in Grade 9 are also available for schools that wish to use them on an optional basis. The tests used in the program are standardized reading and mathematics achievement tests developed and published by the Education Department and based on New York State courses of study:

Grade	*Name of Test*[2]	*No. of Questions*	*Testing Time in Minutes*	*Type of Scoring*
3	New York State Test in Reading—Beginning Grade 3—Form C	50	45	Hand or Machine
3	Mathematics Test for New York State Elementary Schools—Beginning Grade 3—Form C	60	50	Hand or Machine
	Pt. 1. Concepts	(26)	(20)	
	Pt. 2. Computation	(16)	(12)	
	Pt. 3. Problem Solving	(18)	(18)	
6	New York State Test in Reading—Beginning Grade 6—Form C	50	50	Hand or Machine
6	Mathematics Test for New York State Elementary Schools—Beginning Grade 6—Form C	67	60	Hand or Machine
	Pt. 1. Concepts	(27)	(20)	
	Pt. 2. Computation	(20)	(20)	
	Pt. 3. Problem Solving	(20)	(20)	
9	New York State Test in Reading—Beginning Grade 9—Form A	50	50	Hand or Machine
9	New York State Test in Mathematics—Beginning Grade 9—Form A	80	60	Hand or Machine
	Pt. 1. Concepts	(32)	(18)	
	Pt. 2. Skills	(24)	(16)	
	Pt. 3. Problem Solving	(24)	(26)	

[2] Samples of the Third and Sixth Grade tests and their scoring keys are appended hereto as Exhibits 1 through 8, respectively. Samples of the Ninth Grade tests and their instruction manuals and scoring keys are appended hereto as Exhibits 9 through 14.

The Education Department sends order forms for test materials to each school administrator or principal, who fills out and returns the order forms to the Department. The Department ships the test materials and the score report forms directly to the schools according to directions on the order forms. The schools administer and score the tests, fill out the score report forms, and return them to the Department.

Schools prepare frequency distributions of the scores of their pupils and report these distributions to the State Education Department on Optical Scanning report forms.[3] The distributions of scores are processed by computer, and several reports which summarize the results in conveniently interpretable form are returned to each school and central office. A copy of each report is kept on file in the Education Department, and, in addition, the Department prepares a statewide annual summary report which highlights trends and needs in various types of schools and communities throughout the State.

The reports sent to schools and school-system central offices are as follows:

Name of Report[4]	*Distribution*
1. School Testing Report A. School Summary Table B. Total Score Distribution Tables	Copies to both the school and the central office
2. Five-Year Summary Report	Copies to both the school and the central office
3. Five-or-More School Buildings Report	Copy to central office only
4. Performance Indicators in Education (PIE) Report	Copy to central office only

[3] Samples of these reports are appended hereto as Exhibits 15, 16 and 17.

[4] Samples of these reports are appended hereto as Exhibits 18 through 21, respectively.

16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials; proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

17. Nonpublic schools are required to file by a specific date each year a Basic Educational Data System (BEDS) Report of Nonpublic Schools with the Bureau of Educational Data Systems of the State Education Department. A sample of such a report is appended hereto as Exhibit 22, and a sample of the Instruction Manual is appended hereto as Exhibit 23.

18. Nonpublic-school personnel perform the following services in regard to BEDS reports: collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report.

19. Regents examinations are end-of-course comprehensive achievement tests based on State courses of study for use in grades 9-12. They are prepared by the Education Department and may be administered only at official centers within the State of New York. The official centers include (1) all registered secondary schools and (2) other educational institutions which have been given specific approval to administer Regents examinations.

Regents examinations are provided presently in 19 subjects: Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science;

English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish. Samples of the June 1977 Regents examinations in Biology, English and Tenth year mathematics and their scoring keys are appended hereto as Exhibits 24 through 29, respectively.

The school principal or chief administrative officer of the examination center is responsible for the enforcement of the regulations for administering Regents examinations.

Order forms for both examination booklets and scoring keys are mailed to schools well in advance of the examination periods. Complete instructions and an examination schedule are enclosed with the order forms. Orders must be returned by the date specified in the instructions.

Examination booklets are shipped directly to schools so as to arrive a few days prior to the start of the Regents examination period. The booklets are shipped in locked metal boxes, and the padlock keys are sent to the principal by first-class mail.

Generally, scoring keys are not shipped with the examination booklets; rather, they are sent to a regional center for release after the uniform statewide admission deadline for each examination. Schools must arrange to pick up scoring keys from the regional center which they designate on their order forms.

The principal must keep the examination materials in a fireproof and burglarproof safe or vault. A locked closet is not adequate. If possible, the materials are kept in the locked metal box in which they were received. Box keys and vault combinations must be maintained under strict security conditions to preclude access to the examination materials by students and other unauthorized persons. All school building personnel who may receive the Regents

examination shipment, either during or after regular school hours, must be informed by the principal concerning the security procedures to be followed.

If a safe or vault is not available in the school, the principal must make arrangements to store the examination materials in the vault of a bank or in the vault of another school, school district building or BOCES. If such arrangements cannot be made, it is the responsibility of the principal to notify the Bureau of Elementary and Secondary Educational Testing so the examination materials can be sent to an appropriate storage facility.

Each teacher or deputy employed in the conduct of Regents examinations must read with care, prior to the examination date, the appropriate sections of the Regents Examination Manual.[5] All proctors must enforce the regulations in every particular.

The principal is responsible for the rating of all papers written in the school. He is required to establish rating and checking procedures that will assure reasonable confidence in the accuracy of the ratings assigned to the examination papers.

To assist teachers in properly rating Regents examinations, the Education Department makes rating guides available, a sample of one of which is appended hereto as Exhibit 31.

At the conclusion of each examination period, the Education Department asks each school to submit for review both the passing and the failing papers written in certain subjects. In March/April and in August, schools are asked to return papers in all subjects. In January and June, a random sampling procedure is used so that the subjects selected will vary from school to school and from year to

[5] A sample is appended hereto as Exhibit 30.

year. Under this sampling procedure, every paper written in a school is equally likely to be selected regardless of which papers may have been reviewed in previous years.

Principals are required to make the necessary arrangements to have requested papers shipped promptly to the Department in the Regents box. Only the papers in subjects requested for review are submitted. All papers not requested to be sent in for Department review must be retained in the school files for at least one year. Any or all of these papers may be called for official review during this period.

The Regents examination papers submitted by each school are very carefully reviewed at the Department by a special group of experienced classroom teachers, under the supervision of the Department staff. Apparent discrepancies or errors in school ratings are called to the attention of the principal.

Every principal who orders Regents examinations must submit a Regents Examination Report.[6] The information required in the report includes, in addition to the number of Regents examination papers written and the number passing in each subject, the total enrollment in each subject for which a Regents examination is offered. Every Regents examination administered, for whatever purpose, shall be included in the Regents Examination Report.

The principal must certify on this report that the rules and regulations for administering Regents examinations were faithfully observed. And each deputy and proctor must certify, by individually signing a certificate, that the rules and regulations for administering Regents examinations were faithfully observed. A sample Deputy and Proctor Certificate is appended hereto as Exhibit 33.

[6] A sample is appended hereto as Exhibit 32.

20. Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collection of materials; proctoring of examinations; scoring of the examinations; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

21. The "statewide evaluation plan" referred to in Section 3 of Chapter 507 has not yet been implemented by the Education Department, and no nonpublic school has sought reimbursement for compliance therewith.

22. Section 3211 of the New York Education Law provides, in part:

Records of attendance upon instruction

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction, or any other school district employee as may be designated by the commissioner of education under section three thousand twenty-four of this chapter, shall keep an accurate record of the attendance and absence of such minor. Such record shall be in such form as may be prescribed by the commissioner of education. . . .

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of the records

of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends, as provided by part one of this article, shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. He shall give prompt notification in writing to the school authorities of the city or district of the discharge or transfer of any such minor from attendance upon instruction, stating the date of the discharge, its cause, the name of the minor, his date of birth, his place of residence prior to and following discharge, if such place of residence be known, and the name of the person in parental relation to the minor.

23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N was appended as Exhibit 6 to defendant Nyquist's responses to the plaintiffs' interrogatories, and a sample is appended hereto as Exhibit 34.

24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports;

recording of attendance on record forms prepared to meet State specifications;[7] ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers.

25. The Regents Scholarship and College Qualification Test (RSCQT) has been used as the competitive examination in awarding Regents scholarships to high school graduates residing in New York State.[8] In addition, the RSCQT has been used as one of the required admissions tests for the various units of the State University. On a broader scale, the results of the RSCQT have been used by guidance counselors to assist high school seniors seeking admissions to colleges throughout the State and country.

A new examination was prepared each year and administered in late September or early October in approved high schools of the State, under the supervision of their principals. The answer papers have been scored at the State Education Department, with the score reports sent to the schools in December.

Three different types of Regents scholarships have been awarded: the Regents college scholarship, the Regents professional education in nursing scholarship, and the Regents scholarship for Cornell University. All scholarships are limited to full-time study in approved programs situated in New York State. No assistance can be received for theological study.

---

[7] A sample of a State-approved Register of Attendance which nonpublic schools purchase for this purpose is submitted herewith as Exhibit 35.

[8] For the first time, during the present school year (1977-78), a different testing program will be used.

The RSCQT has been divided into two parts, Part 1 administered in the morning and Part 2 in the afternoon.*

Part 1 has been a test of general scholastic aptitude, containing questions intended to measure ability to think clearly and accurately. Candidates have been required to demonstrate capacity to perceive relationships, to reason logically and to solve problems. The questions have not been directly related to the subject matter of courses studied but depend rather upon general capacity to undertake college-level work successfully. Part 2 has been a test of subject matter achievement directly related to courses studied in high school.

To provide a general picture of the scope of the RSCQT, the subtests are indicated below, together with the approximate number of questions and credits assigned to each. Each question is worth one credit.

Part 1: General scholastic aptitude		150
Same-opposite	30	
Verbal analogy	40	
Sentence completion	30	
Arithmetic reasoning	50	
Part 2: Subject matter achievement		150
English	40	
Social studies	40	
Art and music	10	
Science (general science and biology)	30	
Mathematics (through 10th year mathematics)	30	
Total		300

Each March, principals of approved high schools in New York State have been requested to order, on forms provided at that time, all materials for the examination scheduled for the following fall.

* For a description of the RSCQT, see Exhibit 36 hereto.

The regulations and procedures for administering the RSCQT were generally comparable to those for administering Regents examinations. However, there were important differences due particularly to the competitive nature of the examination. The question booklet had to be held secure at all times, after the examination as well as before. This meant that all question booklets, both used and unused, had to be returned to the Department immediately following the examination and that only scholarship candidates were permitted access to the content of the booklets during the examination.

Copies of the RSCQT Administration Manual[10] have been distributed prior to each examination period. This manual contained detailed instructions for administering the examination, including instructions to be read verbatim to candidates. Each principal and proctor has been required to read the examination manual and to become thoroughly familiar with the examination procedure well in advance of the examination date.

26. Optional State high school achievement examinations,[11] basic competency tests,[12] and New York State standardized tests in Grade 6 science, 7th and 8th Grade mathematics[13] and in physical fitness, Grades 4-12 are administered by nonpublic-school personnel in nonpublic schools. When administered, the services performed by such per-

[10] A sample is appended hereto as Exhibit 37. Nonpublic-school personnel performed the services specified therein.

[11] Samples and their scoring keys are appended hereto as Exhibits 38 through 41.

[12] Samples and their instructions and scoring keys are appended hereto as Exhibits 42 through 48.

[13] Samples and their direction manuals and scoring keys are appended hereto as Exhibits 49 through 54, respectively.

sonnel are prescribed by the respective Department of Education test materials and instructions.

27. By October 15th of each year, secondary nonpublic schools are required to file a Secondary School Report with the Education Department. A sample of such a report is appended hereto as Exhibit 55.

28. In filing Secondary School Reports, nonpublic-school personnel perform the same tasks as are performed in regard to the BEDS reports, as specified in paragraph 18 above.

29. Section 176.2 of the Regulations of the Commissioner of Education provides:

> Application for apportionment and required accounting records.
>
> (a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner of Education.
>
> (b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:
>
> (1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include

> accounts for salaries, supplies and materials, contractual expenses and fringe benefits.
>
> (2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.
>
> (3) An individual salary record for each employee involved in providing services for which apportionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.
>
> (4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

30. The responses to the plaintiffs' interrogatories filed herein each contained copies of State Education Department Forms SA-186 and SA-187. These forms show precisely the method used to compute the amounts apportioned to the intervenor-defendants under Chapter 507 for the school year 1974-75. They are appended hereto as Exhibits 56 through 60 and are referred to for the contents thereof.

31. Chapter 507 restricts apportionments to the actual costs incurred by nonpublic schools in performing the specified required services. These costs are calculated pursuant to the Forms SA-186 and SA-187 and are reimbursed during the succeeding school year when nonpublic schools are incurring similar costs anew. As a rule, apportionments received pursuant to Chapter 507 are placed in gen-

eral accounts and cease to be identifiable as to disbursement.

Dated: New York, New York
September 26, 1977

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(J-50)

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,
Appellants,

— against —

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,
Appellees,

- and -

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,
Intervening Parties-Appellees.

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Table of Cases:

Table of Authorities:

Page

Table of Authorities (cont'd.):

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No.

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Intervening Parties-Appellees.

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss this appeal, or in the alternative, to affirm the judgment below on the grounds that the appeal does not present a substantial Federal question and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTION INVOLVED

Does the reimbursement by the State of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

> "Congress shall make no law respecting the establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States (*Cantwell* v. *Connecticut*, 310 U. S. 296 [1940]).

Chapter 507 of the New York Laws of 1974 provides as follows in pertinent part:

> "Section 1. Legislative findings. The legislature hereby finds and declares that:
>
> "The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.
>
> "To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.
>
> "In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.
>
> "More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.
>
> * * *
>
> "§ 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.
>
> * * *
>
> "§ 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.
>
> "The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services

enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount."

* * *

Chapter 508 of the New York Laws of 1974, amending chapter 507, provides as follows in pertinent part:

> "§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

FACTS

Plaintiffs (appellants) commenced this action seeking to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that they violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they prevent the free exercise of plaintiffs' religion through compulsory taxation to support religious schools. The complaint also seeks an injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Interrogatories were served by plaintiffs on the defendants and intervenor-defendants. The answers to those interrogatories have been served on the plaintiffs, filed with the District Court, and are a part of the record in this case.

The facts are not in dispute. On May 23, 1974, then Governor Malcolm Wilson signed Chapters 507 and 508 of the Laws of 1974, to become effective July 1, 1974. The statute directs the Commissioner of Education of the State of New York to apportion and pay to nonpublic schools in the State the actual cost incurred by the schools during the preceding school year for providing services required by law to be rendered to the State in compliance with the requirements of the State's Pupil Evaluation Program (PEP), the Basic Educational Data System (BEDS), Regents Examinations, the Statewide Evaluation Plan, the Uniform Procedure for Pupil Attendance Reporting, and "other similar state prepared examinations and reporting procedures".

Payments are to be made only on vouchers audited by the State Comptroller; the schools must keep records showing expenditures and costs of record keeping and test administration. The Comptroller may also examine the books and records of any qualifying school and if the school is shown to be overpaid, the school must immediately reimburse the State for the amount overpaid.

The expressed purpose of the statute, as set forth in the first section of the act, is to evaluate, through a system of uniform State testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities. The statute recognizes that the costs of the same testing and similar reporting regulations are financed for public schools through public funds.

The expressed purpose of the statute is to provide compensation to the nonpublic schools for those services mandated by State law or by regulations of the Commissioner of Education, in connection with the State's responsibility for reporting, testing and evaluating the quality of education being provided to nonpublic school pupils.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to those of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected. [An outline of statutory requirements is contained in Exhibit 1 to Commissioner Nyquist's answers to plaintiffs' interrogatories, entitled "Laws, Regulations and Guidelines Apportionment to Nonpublic Schools".]

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regents' examinations, which test acquired knowledge relative to specific courses of study, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of assuring that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.

As of February, 1975, there were 1954 nonpublic schools in the State of New York (Exhibit 7 to Commissioner Nyquist's Answers to Plaintiffs' Interrogatories), in which some 700,000 pupils were enrolled. Pursuant to the requirements of Chapter 507, the State Education Department has adopted a system of accounts, which must be maintained by nonpublic schools receiving aid pursuant to the act, which system requires the maintenance of accounts showing the actual costs to the schools for personal services, supplies, materials, and other contractual expenses, of the Pupil Evaluation Program, Basic Educational Data System, Regents Examinations, the Statewide Evaluation Program, and Pupil Attendance Reporting. It is those actual costs upon which reimbursement is based.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS IN ACCORD WITH WOLMAN v WALTER (433 US 299) AND PRIOR DECISIONS OF THIS COURT, SUPPORTING CAREFULLY DRAWN AND AUDITED PROGRAMS OF REIMBURSEMENT TO NON-PUBLIC SCHOOLS FOR PERFORMING SECULAR FUNCTIONS.

The statutes at issue here, chapter 507, Laws of 1974, as amended by chapter 508, were enacted by the New York State Legislature following the decision of this Court rendered in *Levitt* v *Committee for Public Education*, 413 US 472 (Levitt I, 1973), to remedy the defects found by this Court in an earlier New York statute on the same subject. Whereas the earlier statute had provided reimbursement for testing prepared and conducted by teachers in nonpublic schools, the 1974 statutes provided reimbursement for the expense of grading only standardized tests prepared by the State Education Department. Although both the former and latter enactments also provided reimbursement for mandatory attendance-taking and reporting as well, which accounts for most of the cost involved, the bulk of the argument centered around the testing provisions.

In *Levitt I*, this Court held that insofar as the 1970 statute provided reimbursement for testing prepared and conducted by teachers in the nonpublic, sectarian schools, it had the effect of advancing religion or religious education and led to excessive entanglement by the State in the affairs of religious institutions. In addition, the statute provided a flat annual per-pupil grant* intended to cover projected reimbursable expenses. No accounting was required, and in case the grants actually exceeded costs in any given school, no refund of the excess was required.

While the Court was unwilling to assume that teachers in parochial schools would deliberately and consciously evade statutory and constitutional limitations by incorporating religious instruction into the reimbursed activities, it found a "potential for conflict" inherent in the situation that the State was unable to prevent (413 US at 480). Consequently, the Court held the 1970 statute unconstitutional under the First Amendment.

Guided by the decision in *Levitt I* and other decisions on the same subject (e.g. *Board of Education* v *Allen*, 392 U.S. 236, 20 L.Ed.2d 1060), the New York State Legislature enacted the statutes presently at issue here.

First, it provided reimbursement for the actual cost of taking attendance and reporting attendance figures to the State Education Department. Since the attendance of children at school in New York State is compulsory between the ages of six and sixteen years**, and since the attendance requirement may be satisfied in nonpublic and sectarian schools (*Pierce* v *Society of Sisters*, 268 US 510, 69 L ed 1070 [1924]), it is incumbent upon nonpublic schools to keep records of attendance***.

---

* Twenty-seven dollars ($27) for each pupil in attendance in grades 1-6; forty-five dollars ($45) in grades 7-12.

** Educ. Law §3205.

*** Educ. Law §§3210, 3211.

This, however, is a purely secular activity which inures to the benefit of the children in attendance. The argument that such schools would probably take attendance anyway is speculative and beside the point. In any event, it cannot be argued that the schools would necessarily report periodically on attendance to the State, except as they are now required to do by law. Nothing contained in *Levitt I* would indicate any constitutional defect in this kind of reimbursement, save the fact that in the 1970 statute reimbursement was made on the flat grant system, with no accountability.

Second, the Legislature provided a system of reimbursement for expenses incurred in administering, and in some cases in grading standardized State examinations taken by public and nonpublic pupils alike, such as the "Regents" examinations (the end-of-course achievement tests), the Regents Scholarship tests, the Pupil Evaluation Program (PEP) and the Basic Educational Data System (BEDS). No teacher-prepared tests are reimbursable. The standardized State tests for which reimbursement is provided are objective, multiple-choice, mechanically-graded tests, except that some Regents exams will include essay-type questions, for which rating scales and criteria are provided. Those tests which are intially rated by teachers in the school are subsequently reviewed upon return to the State Education Department. Thus, the opportunity for sectarian teachers to grade tests on the basis of doctrine is extremely limited, and if any "potential for conflict" occurs (*Levitt I*), it *can* be corrected. As this Court said in *Levitt I*, it should not be assumed that teachers in parochial schools will act in bad faith. Here, the "potential for conflict" has been eliminated, and the State maintains an overview of the results to assure that its established grading standards are being adhered to.

Inevitably, of course, the 1974 statutes were challenged on constitutional grounds by the same group and individuals who had mounted the attack in *Levitt I*. At first the three-judge court in the Southern District of New York held the new

statutes unconstitutional. Although it found a secular legislative purpose (the first part of a three-part test devised in earlier decisions of this Court, see *Lemon* v *Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745 (1971)), it also concluded that the "primary effect" of the new scheme was to advance religion, based on this Court's decision in *Meek* v *Pittenger*, 421 US 349, 44 L ed 2d 217 [1975]). Writing for the Court, District Judge WARD said:

> "Absent the decision in *Meek* v *Pittenger*, *supra*, we might have found defendants' arguments persuasive. However, in light of the decision in *Meek*, we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion" (414 F Supp 1174, 1179).

On appeal to this Court by defendants, the judgment appealed from was vacated and the case remanded for further consideration in the light of *Wolman* v *Walter*, 433 US 229, decided June 24, 1977. Following remand, the same three-judge court sustained the constitutionality of the statute (Judge WARD dissenting) upon the decision of *Wolman*, *supra*.

It seems clear, from the foregoing history of this matter, that at least in June 1977, when the case was remanded, the decision in *Meek* v *Pittenger* was not regarded by a majority of this Court as conclusive on the present case.

The Court below explained its earlier decision in the present case by saying it had concluded that *Meek* v *Pittenger* held that "substantial aid to the educational function of [sectarian] schools * * * necessarily results in aid to the sectarian school enterprise as a whole". In other words, no distinction could be drawn between the secular and religious dimensions of education provided in sectarian schools, and thus, both aided the sectarian enterprise.

In *Wolman*, on the other hand, this Court upheld that part of an Ohio statute which supplied to students in nonpublic schools such standardized tests and scoring services as are in

use in public schools. The Ohio tests were prepared, administered and scored by state personnel exclusively. Justice Blackmun reasoned that because sectarian schools could not control the content or result of the examinations, there was no substantial danger that the exams would be used for religious teaching (433 US at 240).

Consequently, the majority below concluded that *Wolman* "must be viewed as rejecting the concept that State support for educational activities necessarily advances religion." The Court then gave consideration to whether the points of difference between the Ohio statute and the New York law were significant enough to render *Wolman* inapplicable. Again, the majority concluded that the risk of New York examinations being diverted to religious purposes "is altogether too insubstantial". Writing for the majority, Circuit Judge MANSFIELD said:

> "* * * The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services."

Turning to the attendance-taking feature of the New York statute (not present in *Wolman*), the majority found that record-keeping is "essentially a ministerial task lacking ideological content or use * * *".

In short, we submit, the same three-judge District Court which had declared these statutes unconstitutional in 1976, on the strength of *Meek* v *Pittenger*, *supra*, now finds persuasive distinctions in this Court's more recent *Wolman* decision which are sufficient to uphold the statutes. In *Wolman*, this Court has adhered to its position in earlier cases (not followed in *Meek*) which permits state aid to those parts of a sectarian school's educational activities which have only secular values of legitimate interest to the State and which aid "does not present any appreciable risk of being used to aid transmission of religious views."

The decision below is in accord with prior decisions of this Court as expressed in *Wolman* v *Walter, supra.*

CONCLUSION

THE APPEAL SHOULD BE DISMISSED OR THE JUDGMENT BELOW AFFIRMED.

Dated: April , 1979

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

against

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervening Parties-Appellees.

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF FOR APPELLANTS

Opinions Below

The majority and dissenting opinions of the District Court, as yet unreported, are set forth in the Appendix to the Jurisdictional Statement herein. In this brief, page references thereto will be preceded by the letters J. S.

Jurisdiction

The decisions of the District Court and the judgment thereon were made and entered on the 20th day of December, 1978. Notice of appeal therefrom was duly served and filed on January 22, 1979. Probable Jurisdiction was noted on June 11, 1979.

Jurisdiction is based upon 28 United States Code, Sec. 1253, 2281, 2284, and upon *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973); *Meek* v. *Pittenger,* 421 U.S. 349 (1975); and *Wolman* v. *Walter,* 433 U.S. 229 (1977).

Statute Involved

The statute involved herein is Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 of the New York Laws of 1974. The provisions involved in this appeal are set forth on pages 4-6, and the full text of the statute on pages E1-5 of the Jurisdictional Statement.

Questions Presented

1. Does the reimbursement by the State of nonpublic sectarian schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose

of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

2. Does Chapter 507, as amended by Chapter 508, of the New York Laws of 1974 comply with the guidelines set down by the decision of this Court in *Levitt* v. *Committee for Public Education and Religious Liberty, supra,* by eliminating teacher-prepared tests from those whose costs are subject to reimbursement and by providing reimbursement for only the actual costs of the services rendered?

3. Does the decision of this Court in *Wolman* v. *Walter, supra,* require a determination that the statutes challenged herein do not violate the Constitution of the United States?

Statement of the Case

Plaintiffs commenced this action to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that those statutes violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they violate the free exercise of religion through compulsory taxation to support religious schools. The complaint sought declaratory judgment and injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the acts. The motion was granted.

The District Court, in its original decision, found the New York statutes to be unconstitutional in that they contravened the prohibitions of the Establishment Clause of the First Amendment, but did not reach the question of whether they also violated the Free Exercise Clause. The Court based its ruling upon the decision of this Court in *Meek* v. *Pittenger, supra.* It found that while the statutes do have a "secular legislative purpose," they also have the "primary effect" of advancing religion. It did not reach the question of whether the statutes resulted in excessive entanglement between government and religion or whether they violate the Free Exercise Clause.

On appeal, this Court vacated the District Court's judgment and remanded the case for reconsideration in the light of *Wolman* v. *Walter, supra.* On reconsideration, the District Court, in an opinion by Circuit Court Judge Mansfield, over the dissent of District Court Judge Ward, upheld the constitutionality of the challenged statute.

Summary of Argument

In order to pass constitutional muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion.

The challenged statute constitutes an impermissible law respecting an establishment of religion in that it has a

principal or primary effect that advances religion. It is constitutionally indistinguishable from all other statutes financing educational services in religious schools, at least at the elementary and secondary school levels, and, with the single exception of *Board of Education* v. *Allen, supra,* have been uniformly held unconstitutional by this Court. In respect to *Allen,* the Court has consistently manifested a clear intent not to extend its holding beyond the specific facts of the case, i.e., governmental subsidization of the purchase of secular textbooks loaned to the pupils.

Independently of purpose, the statute is invalid in that it fosters excessive entanglement with religion. Here, too, with the exception of *Allen* it is constitutionally indistinguishable from all other statutes passed upon by the Court involving a governmental financing of educational services and uniformly held unconstitutional on that ground.

The District Court was in error in adjudging that *Wolman* v. *Walter, supra,* manifests an intent on the part of this Court to weaken or otherwise modify its consistent application of the purpose-effect-entanglement test in respect to aid to religious schools.

Background of the Case

Chapters 507 and 508 of the 1974 Laws of New York, which authorize the State to reimburse private schools for the cost of performing state-mandated pupil testing and record keeping, were enacted to achieve what this Court held constitutionally impermissible in *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973) (*Levitt I*). There the Court struck down an earlier New York statute on the same subject as violative of the

Establishment Clause on the ground that it authorized State financing of tests prepared by sectarian school teachers, which might be used for religious instruction and that the statute had no auditing provisions designed to insure that sectarian schools would be reimbursed by the State only for secular services.

In 1974 the Legislature responded by enacting the statute challenged herein, which sought to remedy the features found objectionable by this Court by providing for State preparation of the tests and auditing procedures to assure that private schools would be reimbursed only for these State-mandated services.

Thereafter, in *Committee for Public Education and Religious Liberty* v. *Levitt,* 414 F. Supp. 1174 (1976) (*Levitt II*), the District Court held that despite these changes the amended statute did not pass muster under the Establishment Clause. After this Court decided *Wolman,* it vacated the District Court's judgment in *Levitt II* and remanded the case for reconsideration in light of *Wolman.*

On remand the District Court held an evidentiary hearing to receive proof relevant to the issues. That proof consisted of a stipulation of facts (Appendix 24a *et seq.*). The stipulation did not set forth any facts differing from those before the District Court when it decided the present suit, nor did the District Court rely upon any new understanding of the factual issues. Its sole reason for reaching a decision contrary to its original one was its determination that *Wolman* had "relaxed some of *Meek's* constitutional strictures against state aid to sectarian schools" and that application of the *Wolman* standards required it to conclude "that amended Chapter 507 may be upheld as constitutional" (J.S. A3).

The amended statute, which became effective July 1, 1974, provides for reimbursement to private schools of the "actual cost" of complying with State requirements for pupil attendance reporting and the administration of State-prepared standardized examinations such as Regents examinations and pupil evaluation tests. These reports and tests are required of public and private schools alike and are designed to improve the educational program offered in New York schools. It is this provision as applied to religious schools (but not as applied to non-religious private schools) which is challenged in the present suit.

In its initial decision, the District Court, having determined that the challenged statute violated the effect aspect of the tri-part test under the Establishment Clause, found it unnecessary to decide whether it also violated the entanglement aspect. 414 F. Supp. at 1180. In the present case, however, its disposition of the former aspect required it to pass upon the latter. In that respect it held that the challenged statute did "not pose any substantial risk of . . . entanglement." J.S. pp. A15-16.

ARGUMENT

I. Introductory

In numerous cases decided within the past decade, the Court has interpreted the Establishment Clause to the effect that in order to pass constitutional muster, a statute must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits

religion, and must not foster an excessive entanglement with religion. *Lemon* v. *Kurtzman, supra; Earley* v. *DiCenso,* 403 U.S. 602 (1971); *Sanders* v. *Johnson,* 403 U.S. 955, affirming without opinion, 319 F. Supp. 421 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education and Religious Liberty, supra; Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Meek* v. *Pittenger, supra; Wolman* v. *Walter, supra; New York* v. *Cathedral Academy,* 434 U.S. 125 (1977).

Prior to these decisions, beginning with *Everson* v. *Board of Education,* 330 U.S. 1 (1947) and in many succeeding cases, the Court held that the Clause means "at least" that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (330 U.S. at 16).

In its more recent decisions applying the purpose-effect-entanglement test the Court manifested no intention of abandoning or weakening in any way the so-called *Everson* no-aid test. Indeed, in its initial decision in the present case the District Court itself quoted and relied upon the above quotation from *Everson* (Statement as to Jurisdiction in *Levitt II,* Appendix A, p. A11).

It is our contention that whether the *Everson* no-aid or the purpose-effect-entanglement test of the more recent decisions is applied, the statute challenged herein cannot stand. We predicate this contention primarily upon the effect and entanglement aspects of the latter test, although we believe and respectfully submit that it fails to under

the purpose aspect. See, *Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *McGowan* v. *Maryland,* 366 U.S. 420, 453 (1961).

II. Advancement of Religion

1. For the following reasons we submit that the challenged statutes effect an impermissible advancement of religion. The fact that the services sought to be compensated under the challenged statute are mandated by law is constitutionally irrelevant. This was determined in *Levitt I* and in *Nyquist,* the former dealing with the predecessor of the present Chapter 507, the latter (in its first part) with law-mandated requirements that schools be safe, sanitary, illuminated and heated.

2. As in *Meek,* the last full scale consideration of the Establishment Clause before *Wolman,* the State of New York "does not inquire into the religious characteristics, if any, of the nonpublic schools requesting aid" under the statute. As in *Meek,* a school is not barred from receiving aid "even though its dominant purpose [is] the inculcation of religious values, even if it impose[s] religious restrictions on admssions or on faculty appointments,[1] and even if it require[s] attendance at classes in theology or at religious services."[2]

1. Of the five intervening defendants in this case, all but Horace Mann-Barnard School (which, plaintiffs concede, is not constitutionally barred from receiving benefits under the challenged statute, and which therefore had no reason for intervening in this suit) have elected to be considered religious or denominational institutions under the provision of Section 313 of the Education Law. See, in each case, Response to Interrogatories, Interrogatory 4. This election exempts them from the statutory prohibition of religious discrimination in admission of students and employment of faculty. National Labor Relations Board v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979).

2. Four of the intervening defendants require pupils to attend classes in the religion of the sponsoring school. See Responses to Interrogatory 5 (d).

3. As in *Meek,* the "primary beneficiaries" of the statute "are nonpublic schools with a predominant sectarian character." In Pennsylvania, the situs of *Meek,* more than 75% of the schools that qualified for state aid were "church-related or religiously affiliated educational institutions." In New York the percentage is about 85. See *Nyquist,* 413 U.S. at 768, footnote 23.

4. As in *Meek,* the state aid is directly to the schools and not to the pupils or their parents (although, of course, even if the latter were true the law would still be unconstitutional under the second and third parts of *Nyquist* and *Sloan* v. *Lemon, supra*).

5. The auxiliary services invalidated in *Meek* were rendered by publicly employed personnel. Under Chapter 507 the services are rendered by the nonpublic school teachers and the money goes to the school, obviously a more direct and substantial aid to the religious schools.

6. As in *Meek,* the challenged services are not in the category of health or welfare, but are purely educational; conducting examinations and taking attendance are obviously educational and not health or welfare operations.

7. Mr. Justice White was the sole dissenter in *Lemon-DiCenso,* but even he agreed that if any school restricted entry on religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith, the aid legislation would to that extent be unconstitutional as impermissible advancement of religion (403 U.S. at 671, footnote 2). As we have noted, the religious intervening defendants do just that.

8. What the Court said in *Meek* is no less applicable here. "Even though earmarked for secular purposes, when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible effect of advancing religion." As in Pennsylvania, "[t]he very purpose of many of these schools is to provide an integrated secular and religious education . . . The secular education these schools provide go hand in hand with the religious mission that is the only reason for the schools' existence." It follows from this that "[s]ubstantial aid to the education function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole." 421 U.S. at 366-367.

All this is applicable even if the auditing and examination procedures prescribed in Section 7 remain in the Act. If these are excised, by reason of Chapter 508 (Section 9 of the combined statute. J.S. E4-E5), the advancement of religion effect of the statute becomes even more flagrant. As the Court stated in *Meek,* the courts may not rely "entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . ." 421 U.S. at 369. Absent auditing and examination the schools have a free hand to use the State funds to advance religion.

III. Entanglement

A. District Court's Disposition

The District Court's initial decision did not pass upon the entanglement issue, raised in the complaint; having

found the challenged statute invalid under the effect prohibition there was no need to do so. On remand, it now obviously became necessary to do so, since the effect barrier was found by the Court not to be present. Its disposition of this aspect, however, was quite summary, at least as compared to its treatment of the effect mandate. For this Court's convenience we reproduce it in full, omitting only the somewhat longer footnote 8.

> Where a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on site judgments from time to time as to whether different school activities are religious in character, the risk of entanglement is too great to permit governmental involvement. See, e.g., *Lemon, supra,* 403 U.S. at 619-22; *Meek, supra,* 421 U.S. at 370-71. The activities subsidized under the Statute here at issue, however, do not pose any substantial risk of such entanglement.
>
> The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, *the careful auditing procedures anticipated by §7 of the Statute* should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision. (Emphasis added.)

In view of this Court's extensive treatment of the entanglement aspect in decisions such as *Lemon,* 403 U.S. 614-626, and *Meek,* 421 U.S. 367-373, among others, it would seem that the District Court's summary disposition of the entanglement barrier is hardly adequate.

B. Administrative Entanglement and Surveillance

As the District Court noted, the statute prescribes "careful auditing procedures." This mandate, we submit, cannot be obeyed without administrative entanglement and surveillance. Even if Section 7 were eliminated from the statute, Section 9 (J.S. E4-E5), the Religion Clauses of the First Amendment forbid the State to grant money to religious schools on their bare assertion that the grant does no more than compensate them for neutral, nonideological, noneducational services.

The services of religious school teachers compensated for under the act are not purely ministerial. Administering examinations to evaluate achievement, even examinations formulated by State officials, is itself an educational operation, and may be used by overzealous teachers as a means to inculcate religious values.

Moreover, and no less important, the State must be certain that the money received by each religious school covers only the time used by the teachers to perform the mandated services (assuming that taking attendance for reporting to State officials can be separated from taking attendance which every school does for its own administration and would do even if it were not required to report to the State). Certainly it would violate the Establishment Clause as well as the statute if the moneys received by a school covered

time that was used for regular teaching rather than attendance keeping.

The State recognizes this and has sought to guard against it. We respectfully call this Court's attention to pp. 31-32 of Laws, Regulations and Guidelines, Apportionment to Nonpublic Schools, Exhibit 1 in Response to Interrogatories, and to System of Accounts for Nonpublic Schools Receiving State Aid under Chapter 507, Exhibit 4 in Response to Interrogatories. We cite simply as one example of governmental entanglement in the internal affairs of church schools the statement on page 4 of the latter document that "a basic daily time record will need to be maintained to substantiate the percentage of salary to be allocated to each required service."

Section 7 of the act, providing for audit and examination, compounds the entanglement. In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), the Court upheld tax exemption of church property on the ground that nonexemption would require the government to audit and examine the operations and records of churches and thus entangle it in religious affairs. The Court said:

> Obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards .... 397 U.S. at 675.

In *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso, supra,* it struck down for the same reason direct financial aid to church schools to compensate for so-called neutral, nonideological secular services. There the Court said:

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, *the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity.* This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

* * *

> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. *In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.* 403 U.S. at 620-622. (Citations omitted. Emphasis added.)

In sum, we submit that it is impossible to administer the act to avoid violation of the advancement of religion

ban or of its own terms without the continuing state surveillance of church school operations which the Establishment Clause forbids.

C. Political Entanglement

In almost all of the cases in which the Supreme Court invalidated direct grants to church schools it emphasized the danger of political entanglement and divisiveness across religious lines. This concern is set forth most fully in *Lemon* v. *Kurtzman*, 403 U.S. at 622-624, where the Court said:

> A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential

> divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.
>
> Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

As we have noted above, in *Meek* the Court reiterated this concern in holding Act 194 of the Pennsylvania Laws to be unconstitutional. What is true of Act 194 of the Pennsylvania Laws is no less true of Chapter 507 of the New York Laws. The combination of potential for political entanglement together with the administrative entanglement necessary to ensure that the state-compensated services do not

advance religion compels the conclusion that Chapter 507, with or without Section 7, violates the Establishment Clause.

IV. The Effect of *Wolman* v. *Walter*

The majority of the District Court in the present case determined that this Court's decision in *Wolman* mandated a reversal of its own decision and the upholding of the challenged statute. We respectfully suggest that the District Court was in error in this respect and that the decision did not, as the District Court asserts, "revive the more flexible concept that state aid to . . . [a sectarian] school's educational activities if it can be shown with a high degree of certainty that the aid will only have a secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views." J.S. A9.

The Court in *Wolman* gave no indication of any intent to modify or weaken all that it had determined in the many cases decided by it during the past decade. (Indeed, as we will indicate shortly, it went further than it had done in any previous case striking down laws granting financial aid to religious schools.) The Court expressly noted that the challenged Ohio statute did not authorize any payment to nonpublic school personnel for the costs of administering tests, so that it could not be claimed that the schools received direct aid in the form of such payment. Moreover, the Court reasoned that since parochial school personnel did not participate in either the drafting or the scoring of the tests, they did not control the content of the tests or their results. This, the Court held, served to prevent the use of the test as part of religious teaching, and thus avoided direct aid to religion. 433 U.S. at 239-40.

> These tests [the Court said] "are used to measure the progress of students in secular subjects." App. 48. Nonpublic school personnel are not involved in either the drafting or scoring of the tests. 417 F. Supp., at 1124. The statute does not authorize any payment to nonpublic school personnel for the costs of administering the tests. 97 S. Ct. at 2606.

In a significant footnote (fn 7) the Court added:

> 7. With respect to the tests the state appellees say: "*No financial aid is involved in Ohio.* The tests themselves are provided." Brief for State Appellees 8. As summarized by the private appellees:
>
> "The new Ohio Act has nothing to do with teacher-prepared tests. *It does not reimburse schools for costs incurred in testing. No money flows to the nonpublic school or parent.* It simply permits the local public school districts to send the standardized achievement test to the nonpublic schools and to arrange for the grading of those tests by the commercial publishing organizations which prepare and grade standardized achievement tests." Brief for Appellees Grit, et al. 53. (Emphasis added.)

In the present case nonpublic schools are involved in the scoring of the tests. The challenged statute does authorize payment—not to the religious school personnel but to the religious school itself, an even more flagrant violation of the Establishment Clause. It does not arrange for the grading of the tests by nonreligious commercial organizations which prepare it for the State. On the contrary, religious school personnel do participate in the grading of the tests. The District Court specifically found that "[s]ome of the examinations contain one or two essay questions . . . which, of course, cannot be graded mechan-

ically." J.S. A4. Among the subjects so tested are Earth Science (which includes evolution, c.f. *Epperson* v. *Arkansas,* 393 U.S. 97 [1968]) and Social Studies. It is axiomatic among educators that testing is part of the teaching process, and certainly so in subjects such as evolution and social studies where pupils are well aware that the teachers' religious and other biases (e.g., racial and political) may well effect the grade received. The fact that random samples of these examinations may be reviewed by the Regents hardly negates the basic fact that testing is a tool of teaching which can be used to convey religious teaching and reflect religious predilections. Moreover, even in respect to the Regents' review of the examination papers, that State intervention itself subjects the procedure to invalidation on the ground of entanglement.

That the Court in *Wolman* did not intend to overrule and vitiate all that it had held in previous cases involving aid to parochial schools at the elementary and secondary levels is clearly established by the fact that it went further in respect to those institutions than it had gone in any of its previous decisions. While expressing itself bound by its previous decision in *Board of Education* v. *Allen, supra,* the Court quite clearly indicated that it had no intention of going beyond the specific holding therein, and accordingly struck down the provision in the Ohio statute for the loan of instructional material and equipment even if they were "incapable of diversion for religions use." 433 U.S. at 248-51.

Moreover, in another respect the Court in *Wolman* went beyond what it had decided in previous cases. For the first time it held unconstitutional the financing of programs pro-

viding field trip transportation to such places as public museums in respect to parochial school pupils. Thus, just as it had refused to extend *Allen* beyond its narrow holding, so too it refused to extend the bus transportation case of *Everson* v. *Board of Education,* 330 U.S. 1 (1947) beyond its narrow holding. It is, we submit, difficult to reconcile the action of the Court in respect to transportation and instructional materials with a determination that the statutes challenged in the present suit do not violate the Establishment Clause.

The District Court's error in assuming that this Court has retreated from its steadfast position on aid to religious schools is manifested by the Court's disposition of three cases which came to it after *Wolman.* The first of these was *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977). There it held that the State could not constitutionally reimburse sectarian schools for the cost of State-mandated record keeping and testing services which were incurred in reliance on the predecessor statute to Chapter 507 before it was held unconstitutional in *Levitt I.* Both the holding and the language of the Court in *Cathedral Academy* controvert the assumption, upon which the majority opinion in the District Court in the present case is based, that the Court has manifested a retreat from or weakening of the Establishment Clause strictures as interpreted and applied in all previous cases since *Lemon* v. *Kurtzman, supra.*

If, the Court held in *Cathedral Academy,* the challenged statute authorized payments for the identical services that were to be reimbursed under the law held unconstitutional in *Levitt,* it was invalid for exactly the same reasons that required invalidation of its predecessor. If, on the other

hand, the new statute empowered the New York Court of Claims to make an independent audit on the basis of which it would authorize reimbursement only for clearly secular services, such a detailed inquiry would itself violate the Establishment Clause by requiring the State to undertake a search for religious meaning in every classroom examination offered in support of a claim, thus imposing upon the Court of Claims the role of arbiter of an essentially religious dispute. "The prospect of church and state litigating about what does or does not have religious meaning [the Court said] touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying that it will happen only once."

The challenged statute, the Court concluded, was unconstitutional because it would of necessity either have the primary effect of aiding religion on the one hand or on the other would result in excessive involvement in religious affairs. There was, in other words, no escape from either the Scylla of aid or the Charybdis of entanglement. As we have noted, no government entanglement in religious affairs was involved in *Wolman,* and that decision therefore in no way affects the disposition of that challenge in the present case.

The second indicator that this Court in *Wolman* did not intend to water down the principles announced in *Meek* and its predecessors is found in *NLRB* v. *Catholic Bishop of Chicago, supra.* There the Court said, at 99 S. Ct. 1319:

> Only recently we again noted the importance of the teacher's function in a church school. "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek* v. *Pittenger,* 421 U.S. 349, 370, 95 S.Ct. 1753, 1766, 44 L.Ed.2d 217 (1975). Cf. *Wolman* v. *Walter,* 433 U.S. 229, 244, 97 S.Ct. 2593, 2603, 53 L.Ed.2d 714 (1977). Good intentions by government—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon, Meek,* and *Wolman.*

It is significant that the opinion in the N.L.R.B. case was written by the Chief Justice, who himself dissented in *Meek.* In respect to the contested issue involved in the present case the Chief Justice recognized the binding effect of *Meek* notwithstanding *Wolman.*

The most recent indication that the District Court misinterpreted this Court's intentions in respect to the Establishment Clause is the Court's affirmance on May 29th of the decision by the United States Court of Appeals for the Third Circuit in the case of *Byrne* v. *Public Funds for Public Schools of New Jersey.* In that case the Court of Appeals (affirming a District Court decision) invalidated a provision in the New Jersey income tax law granting tax benefits to parents paying tuition for children attending religious schools. The precedential weight of the Supreme Court's affirmance is set forth in Footnote 16 in *Meek,* which reads as follows:

> 16. Our conclusion that Act 195's instructional-material and equipment-loan provisions are unconstitutional is directly supported if not compelled, by this Court's affirmance last term of *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29, aff'd, 417 U.S.

961, 94 S.Ct. 3163, 41 L.Ed.2d 1134. The *Marburger* District Court invalidated as violating the constitutional prohibtion against establishment of religion New Jersey's provision of instructional material and equipment to nonpublic elementary and secondary schools. New Jersey's program did not differ in any material respect from the loan provisions of Act 195. See 358 F. Supp., at 36-37. After finding that the non-public schools aided, for the most part, were church-related or religiously-affiliated educational institutions, *id.*, at 34, the court held that the program had a primary effect of advancing religion. *Id.*, at 37. The court also held, as did the District Court in the case before us, that excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. *Id.*, at 38-39. *This Court's affirmance of the result in Marburger was a decision on the merits, entitled to precedential weight.* See *Edelman* v. *Jordan*, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359-1360, 39 L.Ed.2d 662; cf. *Cincinnati, N.O. & T.P.R.Co.* v. *United States*, 400 U.S. 932, 935, 91 S.Ct. 235, 237, 27 L.Ed.2d 240 (White, J., dissenting from summary affirmance 421 U.S. at 366). (Emphasis added.)

In the light of the Court's decision in *Cathedral Academy* and its affirmance in *Byrne*, we suggest that District Court's assumption in the present case that the Supreme Court has retreated from its steadfast position on aid to church-related or religious schools is erroneous.

Conclusion

Under the provisions of the Civil Rights Act of 1964 and the decision of this Court in *NLRB* v. *Catholic Bishop of Chicago, supra,* the religious schools in this case are exempt

from the statutory prohibtion of religious discrimination in admission of student and employment of faculty. The purpose of the exemption is to safeguard the First Amendment protection of religious schools. But the same First Amendment prohibits use of tax-raised funds to finance the educational operations of these schools. That prohibition, as interpreted and applied by the courts in the cases cited in this brief and many others, is based upon the implicit categorical imperative that it is both unconstitutional and inequitable to compel all persons regardless of religion to pay taxes used to finance the operations of schools from which some of them are excluded because of their religion.

For the reasons stated, the decision of the District Court should be reversed and Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 should be declared unconstitutional insofar as they encompass and include religious schools.

Respectfully submitted,

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July, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION, *et al.*,

Appellants,

v.

EDWARD V. REGAN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE YESHIVAH RAMBAM

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OPINIONS BELOW

The opinions of the three-judge district court before and after this Court's remand of the case are reported at 414 F. Supp. 1174 (S.D.N.Y. 1976), and at 461 F. Supp. 1123 (S.D.N.Y. 1978).

QUESTION PRESENTED

Whether a New York statute which authorizes reimbursement of nonpublic schools for the actual costs of administering state-prepared tests and taking student attendance violates the Establishment Clause of the First Amendment.

STATEMENT

Three days after it decided *Wolman v. Walter*, 433 U.S. 229 (1977), this Court vacated and remanded this case to the district court for reconsideration "in light of" *Wolman v. Walter*. Prior to that time, the court below had concluded that New York's 1974 statute authorizing nonpublic schools to be reimbursed for the "actual cost" of administering standardized examinations which were prepared by state officials was unconstitutional under the First Amendment because it had the "primary effect" of aiding "the secretarian school enterprise as a whole," thereby "result[ing] in the direct advancement of religion." 414 F. Supp. at 1179-80.

After remand, the court below examined the New York statute in light of the various aspects of this Court's *Wolman v. Walter* decision. The parties had filed a stipulation that enumerated the kinds of services performed by nonpublic school personnel which were the subject of the reimbursement provision. The following paragraph, describing the services performed with respect to standardized tests administered in the third, sixth, and ninth grades, is illustrative (Appendix, p. 31a):

> 16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials; proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

On its reexamination of the application of the Establishment Clause to the reimbursement to nonpublic schools for such ministerial functions, a majority of the court below upheld the law. The court stated that all the tests covered by the New York law "are prepared by the State." 461 F. Supp. at 1128. The fact that nonpublic school personnel engage in "the almost entirely mechanical method prescribed for their administration" did not, in the view of the majority, present the danger of "injection or inculcation of religious views or principles" to which the Establishment Clause of the First Amendment is directed. Nor, applying this Court's decisions, did the majority below believe that the Constitution was violated by the fact that reimbursement was made directly to the nonpublic schools. And since the services to be performed by nonpublic school personnel under the New York statute "are discrete and clearly identifiable," 461 F. Supp. at 1131, the majority below found that there was no danger of unconstitutional "entanglement." 461 F. Supp. at 1130.

ARGUMENT

IMPLEMENTATION OF THE NEW YORK STATUTE PRESENTS NONE OF THE DANGERS TO WHICH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IS DIRECTED

This Court has had many occasions over the past decade to issue guidelines on the meaning and application of the First Amendment to the field of state financial support of various aspects of education provided in nonpublic schools. The famous "three-part test that has emerged from the Court's decisions," *Wolman v. Walter*,

433 U.S. 229, 235-236 (1977), has been applied in a host of situations. The appellant's brief in this Court argues that the last two parts of the three-fold test are violated by the New York statute.

We maintain that this contention is erroneous, and we agree with the district court's rejection of appellant's claims as to each portion of that test. New York's law neither has the impermissible effect of advancing religion nor does it impermissibly "entangle" government officials with the administration of sectarian schools. There is, however, a more general observation that should be made with regard to this record and the challenge made here by the appellants.

The purpose of the Establishment Clause—as this Court observed in the leading case of *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970) — is to prevent what was described in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), as "three main evils": "sponsorship, financial support, and active involvement of the sovereign in religious activity." This case is such a far cry from these "three main evils" that it demonstrates how, over the past decade of litigation, the forest has been lost for the trees. In determining the constitutionality of this New York statute we urge the Court to step back from a wooden application of the "three-part test" as it did in *Wolman v. Walter* and examine whether and how the particular law, as actually administered, could give rise to the evils which the constitutional provisions prevents.

We deal here with standardized tests—the same examinations being given to public and nonpublic school students throughout the State. The tests are totally secular; there is no opportunity for inculcation of religious dogma in their administration. The questions

consist, almost entirely, "of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination." 461 F. Supp. at 1128.

What function do the personnel of the sectarian schools perform? They order and store the tests under meticulous security conditions. They arrange for distribution and proctoring of the tests. They carry out the mechanical, but time-consuming, task of grading the tests, recording the scores, and sending those records to state personnel. How does payment for these services present any danger whatever of "sponsorship, financial support, and active involvement of the sovereign in religious activity"? The only activity being sponsored and supported is the taking of wholly secular tests which present no opportunity whatever for religious indoctrination.

In *Wolman v. Walter*, 433 U.S. 229, 238-241 (1977), this Court recognized that not all testing administered in a sectarian school violates the Establishment Clause of the First Amendment. The Court held that the provision of standardized tests authored by state personnel presents no danger under the First Amendment (433 U.S. at 240-241):

> The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement.

By the same token, the sectarian school's lack of control over the content of New York's standardized tests prevents use of those tests for religious teaching.

Thus the school's role in administering the standardized tests violates no constitutional prohibition under *Wolman*. And the mechanical function of grading the tests—which teachers perform by themselves and without any communication with a school's students—also raises none of the evils at which the Establishment Clause is directed. The teacher's function is, therefore, totally unlike the function performed in *Meek v. Pittinger*, 421 U.S. 349, 370-371 (1975), where there was a substantial "likelihood of inadvertent fostering of religion."

The remaining question is whether, by providing financial reimbursement to sectarian schools for the "actual cost" of this totally secular, nonreligious activity required by state law, the state oversteps the limits set by the Establishment Clause. The majority of the court below correctly concluded that the mere fact that a sectarian school receives money from the state treasury is not, *ipso facto*, grounds for a declaration of unconstitutionality. Were the constitutional rule otherwise, this Court would have had very little difficulty deciding cases such as *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). If a statute does provide for state financial aid directly to a sectarian school, that is, to be sure, one factor to be given weight in assessing the law's constitutionality (403 U.S. at 621-622), but it is clearly not dispositive.

In this case, the subsidy reimburses the school only for activities which are thoroughly secular and which cannot, by any conceivable stretch of the imagination, be converted to religious indoctrination. Hence the financial aspect of the law does not violate the "primary effect" element of the three-part test.

Moreover, the alternative to a cost-reimbursement process would be for New York State to hire and supervise a separate corps of employees to perform the same ministerial and mechanical functions relating to testing and attendance now being performed by personnel of nonpublic schools. The creation of such a separate bureaucracy would be costly and extremely wasteful. It would provide no added protection against the dangers to which the Establishment Clause is aimed.

Nor is this the type of law which threatens "political divisiveness" along religious lines. The New York statute provides full cost reimbursement for specifically defined services. It is not an open-ended appropriation of a portion of a school's costs. Thus, if the constitutionality of the law is sustained, it cannot give rise to "the likelihood of larger and larger demands as costs and populations grow." *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

Appellant's only remaining argument is that "administrative entanglement and surveillance" may result from the state's audit and examination of how nonpublic schools compute the reimbursement to which they are entitled (Brief for Appellants, pp. 13-16). In fact, the record-keeping to support a claim for reimbursement is, as the majority below recognized, very simple, and the underlying services are "discrete and clearly identifiable." 461 F. Supp. at 1131. State supervision in this area would be minimal, and it would not, in any event, constitute "active involvement of the sovereign in religious activity" within the meaning of the *Walz* rule. 397 U.S. at 668.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1979

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER AND CYNTHIA SWANSON,

Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL AND YESHIVAH RAMBAM,

Intervening Parties-Appellees.

BRIEF FOR APPELLEES, EDWARD V. REGAN AND GORDON AMBACH

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TABLE OF CONTENTS

TABLE OF CASES

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Intervening Parties-Appellees.

BRIEF FOR APPELLEES, EDWARD V. REGAN AND GORDON AMBACH

Statement

The appellants have appealed to this Court from a judgment of a three-judge court in the Southern District of New York, entered on December 20, 1978, dismissing the complaint pursuant to a decision of the three-judge court on December 11, 1978, that

Chapters 507 and 508 of the 1974 Laws of New York do not violate the Establishment Clause of the First Amendment (WARD, D.J., dissenting). The opinions in the District Court are reported at 461 F Supp 1123.

Question Involved

Does the reimbursement by the State of nonpublic schools for actual costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide to the pupils so enrolled a prescribed Statewide standard of education?

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

> "Congress shall make no law respecting the establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States (*Cantwell* v. *Connecticut*, 310 U.S. 296 [1940]).

Chapter 507 of the New York Laws of 1974 provides as follows in pertinent part.

> "Section 1. Legislative findings. The legislature hereby finds and declares that:

> "The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.
>
> "To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.
>
> "In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.
>
> "More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.
>
> * * *
>
> "§ 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.
>
> * * *
>
> "§ 7. Audit. No application for financial assistance under this act shall be approved except upon audit of

vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

"The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount."

* * *

Chapter 508 of the New York Laws of 1974, amending chapter 507, adds §9 as follows:

"§9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

The full text of Chapters 507 and 508 is set out as an Appendix to this Brief.

Facts

Plaintiffs (appellants), who are individual residents of New York State and an association of organizations sharing as a common objective the preservation of the separation of church

and State, commenced this action seeking to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that they violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they prevent the free exercise of the individual plaintiffs' religion through compulsory taxation to support religious schools. The complaint also seeks an injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Interrogatories were served by plaintiffs on the defendants and intervenor-defendants. The answers to those interrogatories have been served on the plaintiffs, filed with the District Court, and are a part of the record in this case.

The facts are not in dispute. On May 23, 1974, then Governor Malcolm Wilson signed Chapters 507 and 508 of the Laws of 1974, to become effective July 1, 1974. The statute directs the Commissioner of Education of the State of New York to apportion and pay to nonpublic schools in the State the actual cost incurred by the schools during the preceding school year for providing services required by law to be rendered to the State in compliance with the requirements of the State's Pupil Evaluation Program (PEP), the Basic Educational Data System (BEDS), Regents Examinations, the Statewide Evaluation Plan, the Uniform Procedure for Pupil Attendance Reporting, and "other similar state prepared examinations and reporting procedures".

Payments are to be made only on vouchers audited by the State Comptroller; the schools must keep records showing ex-

penditures and costs of record keeping and test administration. The Comptroller may also examine the books and records of any qualifying school and if the school is shown to be overpaid, the school must immediately reimburse the State for the amount overpaid.

The expressed purpose of the statute is to provide compensation to the nonpublic schools for those services mandated by State law or by regulations of the Commissioner of Education, in connection with the State's responsibility for reporting, testing and evaluating the quality of education being provided to nonpublic school pupils. The New York State Constitution provides (Article XI, §3) that the State may not use public money "directly or indirectly, in aid or maintenance, *other than for examination or testing*, of any school * * * under the control or direction of any religious denomination * * *" (Emphasis supplied.) The statute recognizes that the costs of the same testing and similar reporting regulations are financed for public schools through public funds.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to those of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected. An outline of statutory requirements is contained in Exhibit 1 to Commissioner Nyquist's answers to plaintiffs' interrogatories, entitled "Laws, Regulations and Guidelines Apportionment to Nonpublic Schools".

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, wholly prepared by the State, such as the Regents examinations, which test acquired knowledge relative to specific courses of study, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 3 and 6 as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various annual reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of assuring that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.

Pursuant to the requirements of Chapter 507, the State Education Department has adopted a system of accounts which must be maintained by nonpublic schools receiving aid pursuant to the act, which system requires the maintenance of accounts showing the actual costs to the schools for personal services, supplies, materials, and other contractual expenses, of the Pupil Evaluation Program, Basic Educational Data System, Regents Examinations, the Statewide Evaluation Program, and Pupil Attendance Reporting. It is those actual costs upon which reimbursement is based.

A Stipulation of Facts, dated September 26, 1977, and filed with the District Court, contains samples of the tests at issue in the action and of the various required reports and statements of expenses. It was filed with this Court in conjunction with our motion to dismiss or affirm.

ARGUMENT

The compensation of nonpublic schools for secular nonteaching services rendered to the State for State purposes does not constitute an establishment of or aid to religion.

No one will question that a State may not use tax money for the support of religion. That, however, is not at issue in this case. What is at issue here is a statute which provides for reimbursement to nonpublic schools of the costs of informational services provided by those schools to the State as a result of the mandates of statutes or regulations. New York State must permit children to attend nonpublic schools, including sectarian schools, if they so desire; that is their constitutional right. At the same time, however, New York State has a legitimate area of concern in ascertaining that those children do attend school, as required by the compulsory Education Law of the State of New York, and that the schools they attend provide an education which meets State minimum standards. To obtain this information, New York State requires all schools, both public and nonpublic, to maintain records of attendance, to administer certain specific State tests and to report to the State on the information contained in these records and ascertained from the tests. Public schools are partially reimbursed for these services in the form of State aid. The statutes here at issue provide reimbursement to the nonpublic schools of only the actual cost of keeping the records, administering tests and reporting the results to the State. The moneys so provided are not provided to pay for the costs of educating children, but only to pay for the costs of informational services designed to determine whether, in fact, the children are in school and are being taught the basic State curriculum.

What is prohibited by the Establishment Clause is aid directed to the advancement of religion. Programs having the purpose of securing information necessary to determine if State laws,

regarding attendance at schools and minimal educational standards, are being met are not directed to the aid of religion; they do not have as their objective aid to any or all religions, but only assist the State in securing necessary information, and assist children in assuring that the schools they attend provide adequate educational programs. This program does not, therefore, constitute an establishment of religion.

The compensation of schools for provision of informational services to the State has a primarily secular effect and purpose. It does not, therefore, constitute an establishment of religion in violation of the prohibitions of the First Amendment.

Where the purpose and effect of the statute is solely to provide reimbursement for noneducational services provided to the State and not to assist the nonpublic schools in their educational functions, there is neither room for nor possibility of excessive entanglements between the church and State. With or without compensation, the State may require and the schools must provide information as to compliance with the compulsory attendance laws and with the requirements of minimal educational standards. The mere fact that the State sees fit to compensate the schools for the cost of providing the information required by the State does not render either the program or the reimbursement unconstitutional, either in the historic concept of the First Amendment or as it has been interpreted by the Supreme Court of the United States.

A. *Factually, the New York Legislature's intent in enacting Chapters 507 and 508 of the Laws of 1974 was to compensate schools for providing required information to the State, concerning compliance with the State's Education Law by nonpublic schools.*

The expressed purpose of Chapters 507 and 508 of the New York Laws of 1974 is to compensate nonpublic schools, without

regard to whether they are sectarian or nonsectarian in nature, for expenses incurred by those schools in keeping records, administering tests, and filing reports as required by State law and regulation.

New York's legislative history clearly shows the inclusion of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York, nonpublic schools are chartered by the 200-year-old Board of Regents of the University of the State of New York (New York Education Law, §§2, 216 [McKinney's Cons Laws of NY, Book 16]). Regents' diplomas are awarded to students at nonpublic and public schools alike upon satisfactory completion of Regents' examinations (Education Law, § 209). There is regular inspection by the State Education Department of the nonpublic as well as the public schools (Education Law, § 305[2]). Nonpublic schools are exempt from taxation (New York Real Property Tax Law, §420 [McKinney's Cons Laws of NY, Book 49 A]). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, § 3204) and satisfies the requirements for part-time attendance (Education Law, § 4601). Conditions of attendance in the nonpublic as well as the public schools are prescribed (Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (Education Law, §§ 3204, 801-811, 3002).

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest an exception was incorporated into the New York State Constitution's prohibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" of those schools (New York Constitution, Article XI, §3). The draftsmen of that exception, incorporated into the State Constitution in 1894, stated in their report to the Constitutional Convention:

> " * * * In the opinion of the committee there is no demand from the people of the State upon this convention so unmistakable, widespread and urgent; none, moreover, so well grounded in right and reason, as that the public school system of the State shall be forever protected by constitutional safeguards from all sectarian influence or interference, and that public money shall not be used, directly or indirectly, to propagate denominational tenets or doctrines. We have sought to give the clearest and strongest expression possible to these principles in the proposed section * * *
>
> "There is one exceptional case provided for in the first sentence of this section, in which public money may be used in connection with a sectarian school or institution of learning, and that is contained in the words, 'otherwise than for examination or inspection' of such institutions. *This exception, in our opinion, in no way affects the principle, except in so far as it emphasizes even more strongly the interest and latent power of the State with regard to all institutions of learning.* * * * [T]he supervision * * * and the system of regular examinations by which the efficiency of these institutions [sectarian and non-sectarian academies] is tested * * * extends the uniformity of excellence maintained by State institutions to those under private and sectarian control * * * " New York State Constitutional Convention of 1894 Documents (Doc No 62, the Report of the Committee on Education, pp 15-17) (emphasis supplied).

Compulsory school attendance laws and the imposition of standards and reporting requirements by the states on nonpublic schools including sectarian schools, have, of course been consistently upheld, over objections predicated on the constitutional right to free exercise of religion, as a legitimate exercise of the police power of the State (*Meyerkorth v State*, 173 Neb 889, 115 NW2d 585 [1962], app dsmd for want of subs fed ques, 372 US 705 [1963], and cases there cited; see also *Board of Education v Allen*, 392 US 236, 246 N 7). Compulsory attendance is enforced by the State as *parens patriae;* violation will result in a neglect

proceeding against the parent. New York Family Court Act, §1012(f)(i)(A) [McKinney's Cons Laws of NY, Book 29A, Part 1).

As of February, 1975, when Commissioner Nyquist's answers to plaintiffs' interrogatories were prepared, there were 1,954 nonpublic schools in the State of New York (Exh 7). Some of the required services performed by those schools include the administration of the tests described above, providing transfer records, certifying grades, providing health transfer records, providing information under the Basic Educational Data System (BEDS), which includes statistical information as to students, teachers, curricula offered, physical plant, etc., statistical data pertaining only to nonpublic secondary schools, somewhat more detailed in nature and type of information than the Basic Educational Data System, maintaining health services records, administering examinations to students not qualifying for a Regents diploma and maintaining those records for inspection, and maintaining attendance records. The statutes at issue here, however, do not provide for compensation for the cost of all those services. Only the costs of Statewide tests, the BEDS reports, and attendance reporting are compensated.

These requirements, imposed upon the nonpublic schools by law or regulation, involve considerable additional expense to the schools for which, immediately prior to the enactment of Chapters 507 and 508, the nonpublic schools were not compensated, although public schools do receive compensation in the form of State aid for similar services which they render to the State.

Nor is this a new program. While immediately prior to the enactment of Chapters 507 and 508 in 1974, nonpublic schools were not compensated for the expenses of examination and inspection required by the State, until 1968 certain nonpublic schools were so compensated and had been since 1892. That provision was incorporated in the New York Education Law in

the consolidation of 1909 as section 453 and was continued and renumbered as section 493 in the consolidation of 1910 (L 1910, ch 140). The provision thereafter remained unchanged until its repeal in 1930 (L 1930, ch 171). However, even after the repeal of section 493, the State's Local Assistance Appropriation Bills (the appropriation for State aid) contained, until 1968, an appropriation of $35,000 in connection with the "attendance requirements of academic pupils at academies meeting the requirements of regents rule". These moneys were apportioned and paid as they have been prior to 1930 to sectarian and nonsectarian schools alike.

In 1970, the State attempted to reinstate the past practice of compensating nonpublic schools for services required of them by the State. By Chapter 138 of the New York Laws of 1970, the State adopted a program to partially reimburse nonpublic schools for the costs of record keeping and test administration. That statute, however, unlike the ones at issue here, included the costs of teacher-prepared tests among those for which reimbursement was made. In holding Chapter 138 unconstitutional, as contravening the Establishment Clause of the First Amendment to the Constitution of the United States, this Court found teacher-prepared tests to be "an integral part of the teaching process" (*Levitt v Committee for Public Education and Religious Liberty*, 413 US 472, 481 [1973]). Consequently, the 1970 statute provided the possibility of compensation by the State for costs of sectarian teaching. In regard to these tests, the Court said (p 480):

> ". . . [N]o attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."

The Court also pointed out that while the statute prohibited the use for religious purposes of moneys received under the act, there was no mechanism provided which could insure that result (p 477):

"However, the Act contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment."

The 1974 statutes here before the Court attempt to meet the objections to the 1970 law expressed in the *Levitt* opinion. Teacher-prepared tests have been eliminated from eligibility for compensation; only actual costs of State tests and record keeping are to be reimbursed, payments are based on detailed vouchers showing costs of services rendered, the State Comptroller is given the discretion to audit the accounts and records of any school to check the cost figures submitted to the State, and there is a provision for recoupment by the State of excess payments.

The 1974 statutes clearly express their intention to provide compensation for the provision of secular informational services *to the State*. Chapter 507, §1 provides:

"The State has the responsibility to provide educational opportunity for a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

• • •

"It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating."

It is thus clear that the purpose of Chapters 507 and 508 is to compensate nonpublic schools solely for providing testing and informational services to the State which are nonsectarian in nature and which serve the State's purpose of examination and inspection of nonpublic schools. Such services assure that the children attending nonpublic schools are complying with the State's compulsory attendance law and that the schools meet minimal standards of educational quality. The payments are not made for the purpose or with the effect of aiding the educational or teaching mission of the schools.

B. *The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion in the historical context of the First Amendment.*

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying the Amendment to current situations (see, *e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1 [1947]; *Abington School District* v. *Schempp*, 374 U.S. 203 [1963]; concurring opinions of Justices DOUGLAS and BRENNAN in *Lemon* v. *Kurtzman*, 403 U.S. 602 [1971]).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove many colonists from Europe to America. But those same practices were, in

many instances, transplanted to the New World and, at the time of the adoption of the Constitution and the Bill of Rights, there were established churches in a majority of the original Thirteen Colonies and almost every state exacted some kind of tax for church support. In the language of the opinion of this Court in the *Everson* case, *supra* (p. 11):

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churchs and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment?

Sectarian property and income is tax exempt (*Walz v. Tax Commission*, 397 U.S. 664 [1970]); clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; Federal funds were made available to sectarian institutions to repair buildings and replace equipment lost or damaged in the floods of June, 1972; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.[1]

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both

[1]Hill-Burton Act of 1946, 60 Stat. 1040, 42 USC §§ 29-92.

directly and through the institutions they attend. Among these are the National School Lunch Act,[2] free milk under the Agriculture Act of 1949,[3] the National Defense Education Act of 1958,[4] College Housing Act of 1950,[5] the Higher Education Facilities Act,[6] the Higher Education Act,[7] the Elementary and Secondary Education Act,[8] the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,[9] and the G.I. Bill of Rights.[10]

From this listing we must assume that either the Congress and the Presidents have been totally wrong as to permissible government action under the First Amendment, or that the Amendment does not bar nonpreferential payments of public money to all schools, all pupils, or all institutions, regardless of religious affiliation, and that where valid secular purposes are the primary basis for the payment of public money, such payments are constitutional and valid.

[2]60 Stat. 230 (1946), 42 USC § 1751.

[3]63 Stat. 1051 (1949), 7 USC § 1431.

[4]72 Stat. 1580 (1958), 20 USC §§ 401-589.

[5]12 USC §§ 1749-1749e.

[6]77 Stat. 363 (1963), 20 USC §§ 701-757, *Tilton v Richardson*, 403 US 672 (1971).

[7]79 Stat. 1219 (1965), 20 USC §§ 1001-1144.

[8]79 Stat. 27 (1965), 20 USC §§ 236-244, 331-332.

[9]58 Stat. 765 (1944), 40 USC §§ 484 (j) and 484(k); 107 Cong Rec 17351.

[10]66 Stat. 663 (1952), 38 USC § 911.

C. ***The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion as defined by the decisions of this Court, but is rather a constitutional use of State funds for State purposes.***

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson* v. *Board of Education*, 330 US 1 [1947]). In that case the Supreme Court of the United States held that the nonpreferential providing of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court, in an opinion by Mr. Justice BLACK, clearly set forth the purpose and intent of the Establishment Clause, stating (pp 15-16):

> "The 'establishment of religion' clause of the First amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That opinion did not declare to be prohibited general public programs not intended or directed to

the aid of religion which incidentally or collaterally aid a religious institution.

Even more recently than *Everson*, a decision of the Supreme Court of the United States has clearly held that laws are not rendered invalid solely because there may be some indirect or collateral aid to proponents of a religious belief or to sectarian institutions. In the Sunday-closing cases, the Court upheld the validity of laws making Sunday a universal day of rest in the face of the admittedly religious origin of those laws and the fact that their current enforcement incidentally aids certain religious denominations in the profession of their beliefs. In so holding, the Court interpreted the Establishment Clause "in the light of its history and the evils it was designed forever to suppress" (*McGowan* v. *Maryland*, 366 U.S. 420, 442 [1961]). The opinion further states (p. 442):

> " * * * the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenents [sic] of some or all religions."

Furthermore, as the Court said in *Everson*, (*supra*, 330 U.S., p. 18):

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In the instant case, where the State has imposed these record keeping, examination and reporting requirements upon the nonpublic schools for State purposes, to deny the State the right to compensate the schools for the cost of fulfilling those requirements would be, in effect, requiring the State to be the adversary of religious institutions.

Mr. Justice FRANKFURTER, concurring in *McGowan, supra,* stated the purpose of the Establishment Clause to be simply to assure that religion, as religion, would not be made the object of legislation (366 U.S., p. 465). In this regard, he stated, the object of the legislation must be determined (pp. 466-467):

> "To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine — primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion — the regulation is beyond the power of the state. This was the case in *McCollum.* Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone — where the same secular ends could equally be attained by means which do not have consequences for the promotion of religion — the statute cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'etre* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce* v. *Society of Sisters,* 268 U.S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."

In the same opinion, rejecting a plea to look behind the legislative findings of the statutes there involved, Mr. Justice FRANKFURTER also observed (p. 469):

> " * * * the private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' *McCray* v. *United States,* 195 U.S. 27, 56. 'Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.' "

Applying these decisions to the instant case, we observe the following factors. The intent of the statute was set forth in the statement of legislative policy in Chapter 507, as has been quoted previously in this brief. That statement may be summarized to show intent to assure that students who elect to attend non-public schools are actually in daily attendance at those schools; that they receive an education with at least minimum requirements, both in course content and teacher qualifications; and that the education they receive is adequate for them to reach levels of achievement at least on a level with students in public schools. The statute demonstrates a secular policy of assuring equality of educational opportunity to all children.

Of greatest significance in determining the validity of the statute here involved are the decisions of this Court in *Lemon v Kurtzman* (403 US 602 [1971]) and *Tilton v Richardson* (403 US 672 [1971]); *Levitt v Committee of Public Education and Religious Liberty* (413 US 473 [1973]); *Committee for Public Education and Religious Liberty v Nyquist* (413 US 756 [1973]); *Meek v Pittenger* (421 US 349 [1975]); and *Wolman v Walter* (433 US 299 [1977]) as the latest examination of that issue. An

analysis of those opinions, we submit, clearly shows that the program enacted by Chapters 507 and 508 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State.

In the *Lemon* case, the Court was confronted with two statutes, one of which provided a subsidy for the payment of the salaries of teachers in nonpublic schools and the other provided compensation to the schools for the teaching of certain secular subjects by the nonpublic schools. In *Tilton*, the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (403 U.S., p. 612):

> "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law."

and again (p. 614):

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement in *Lemon*, first above quoted, as applicable to that case as well (403 U.S., p. 678).

The tests of constitutionality were stated in *Lemon* as being (pp. 612-613):

> "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).
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> • • •
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> " • • • Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz, supra*, at 674."

In *Tilton*, the Court said (p. 679):

> "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, this Court stated in *Lemon* (p. 615):

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purpose of the institutions receiving the money may be the same as those in *Lemon*, the nature of the payments so provided and the resultant relationship between government and religion are vastly different.

This Court in the cases above cited recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid or payments are by their nature constitutional, even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, the Court said in *Lemon* (403 U.S., p. 613):

> "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again at page 614:

> "Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted, Chapters 507 and 508 are directed, in part at least, to assuring compliance with the compulsory attendance laws of the State of New York.

Further, in *Lemon*, the Court also observed (pp. 616-617):

> "Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

In *Tilton*, the Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

> "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upehld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and non-ideological. It compensates all nonpublic schools, sectarian and non-sectarian alike, for record keeping, testing and

reporting, required by the State in enforcing the compulsory school attendance laws and for the purpose of assuring that the schools are fulfilling requirements of State law and regulation providing for minimal educational standards. The tests for which compensation is made are entirely State devised tests, administered in both public and nonpublic schools pursuant to State requirements, designed to measure compliance with the minimal educational standard requirements. These testing, record keeping and reporting functions are both secular and non-ideological in nature.

Although compensation of the schools at cost for these non-ideological services will free other money of the schools so that it could be used to advance the sectarian mission of the schools, or for the improvement of secular educational services, that factor alone is not a basis for invalidation of the statute, as the Court observed in *Tilton*, as quoted above.

While invalidating the statutes at issue in the *Lemon* case, the Court also found that a "comprehensive, discriminating, and continued state surveillance will be inevitably required" to insure that restrictions against the use of the money, there provided, for sectarian purposes would be obeyed. The Supreme Court was concerned about the extent of the inspection and auditing which would be required to determine the amount of a school's expenditures for secular versus sectarian education for the purpose of determining the amount of compensation to be paid. This, the Court found, would result in "excessive entanglement" between government and religion. Here, however, there is no need for continuing surveillance. In the case of the statutes here at issue, there is provision only for maintenance of records and accounts which can be audited at the option of the State Comptroller, and submission of vouchers for reimbursements based on the actual cost of administering the tests and keeping the required records. There is no surveillance

required to determine that funds are not used for religious education since, unlike the situation in *Lemon*, there is no reimbursement for teaching services.

Significantly, in *Tilton*, upholding the Federal Act there involved, this Court observed that "The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides." The Pennsylvania and Rhode Island statutes involved in *Lemon* were distinguished on the basis that "There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities."

The statutes in the instant case are immeasurably different from those invalidated in *Lemon*. The aid here is secular, nonideological and neutral in nature. It does not involve *annual* audits or constant governmental surveillance over expenditures. It merely compensates the schools for the costs they incur in providing record keeping and testing services required by the State in enforcing compulsory school attendance laws and laws requiring attainment of minimal educational standards by the nonpublic schools.

The education of our Nation's children has, quite properly, been recognized by this Court as a proper subject of state legislation enacted in furtherance of a public interest (*Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 [1930]; *Board of Education* v. *Allen*, 392 U.S. 236 [1968]). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning. Rather, educational goals may effectively be satisfied through private education (*Pierce* v. *Society of Sisters*, 268 U.S. 510 [1925]). As a corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory attendance laws through private educational institutions, the Court, in the *Allen* case, observed (392 U.S., p. 247):

> "* * * if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function."

The statutes here in question do not involve the State in the actual educational process of the schools. They do not compensate them for their teaching function as such. They do no more than compensate all private schools, sectarian and nonsectarian alike, for the expenses of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education which is necessary for the young people of the State, that is, in determining the "manner in which those schools perform their secular function."

In *Allen*, the Supreme Court further observed as to the nature of nonpublic schools (p. 245):

> "The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education."

The compensation here provided by Chapters 507 and 508 is directed solely toward the secular function of the schools. It compensates for services directly and solely related to the State's secular interests in the schools.

As to the powers of the states in regulation of nonpublic schools the Supreme Court stated in *Allen* (pp. 245-246):

> "Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."

If the State may establish such regulations, and consequently require compliance with record keeping, reporting and testing requirements in order to assure compliance with these regulations, then surely the State should be allowed to alleviate the cost burden it has imposed on the schools.

The Court in *Meek* v. *Pittenger, supra,* reasserted the principles in *Allen* and approved the Pennsylvania textbook statutes there at issue. The Court did, however, disapprove compensation for teaching services, even though remedial in nature, a factor not at issue here.

In *Levitt* v. *Committee for Public Education and Religious Liberty, supra,* the New York statute provided for payments to nonpublic schools to reimburse them for costs of record keeping and testing, including teacher prepared tests. Comparing the fact situation at issue there and in *Committee for Public Education and Religious Liberty* v. *Nyquist,* decided the same day, the opinion of this Court stated (413 US, pp 479-480):

> "The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist*.[7] As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."

"[7]We do not doubt that the New York Legislature had a 'secular legislative purpose' in enacting Chapter 138. See *Epperson* v. *Arkansas,* 393 U.S. 97 (1968). The first section of the Act provides that the State has a 'primary responsibility' to assure that its youth receive an adequate education; that the State has the 'duty and authority' to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being provided; and that the State has a legitimate interest in assisting those schools insofar as they aid the State in fulfilling its responsibility."

Distinguishing *Everson* and *Allen,* the Court held (413 U.S., p. 481):

> "In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests, as noted by the District Court, are 'an integral part of the teaching process.' 342 F. Supp., at 444. And, '[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.' *Lemon* v. *Kurtzman, supra,* 403 U.S., at 617."

It is submitted that the determinative difference between Chapter 138, held invalid in *Levitt,* and Chapters 507 and 508, at issue here, is the absence in the latter statutes of compensation for teacher-prepared tests. This is apparent from the conclusion of the Court's opinion in *Levitt* (413 U.S., p. 482):

> "We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Here there are no teacher-prepared tests, no single per-pupil allotment, but only a statute providing for reimbursement for the actual cost of administering State-prepared and mandated tests and maintaining attendance records.

It is necessarily a secular purpose and intent to assure that children attending nonpublic schools comply with the compulsory attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic

achievement. Since these are secular, neutral and non-ideological requirements and services, fulfilling State-imposed requirements, and since the moneys apportioned to the nonpublic schools are solely for the purpose of compensating them for those required secular services, then neither the purpose nor the primary effect of the enactment is the advancement or inhibition of religion.

One final quotation from the *Allen* case, which was followed in *Meek* v. *Pittenger, supra,* is pertinent here, summarizing the relationship of the sectarian function to the secular education function of the private schools as viewed by this Court. The Court there stated (392 U.S. 247-248):

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

If the State may expend public moneys to insure that public schools provide minimal levels of education, if the nonpublic schools are a constitutionally acceptable conduit for the teaching of children in secular subjects, if the State may require that nonpublic schools meet specific standards of minimal educational offerings and achievement, and if the State may require that nonpublic schools keep records, administer tests and report thereon in order to assure that they comply with State-imposed educational requirements, then the State must also be able to spend public moneys to assure that these schools actually do perform in an acceptable manner and that students attend in compliance with the compulsory education laws. That permissible expenditure of public moneys must include the right to compensate the schools for the expenses imposed upon them by the examination and inspection requirements of the State.

Chapters 507 and 508 of the New York Laws of 1974 have a secular legislative intent and a primary effect which neither advance nor inhibit religion. The payments provided under those acts are for neutral, secular and non-ideological services to the State by the nonpublic schools. The provision for those payments does not involve an excessive entanglement between government and religion. The statutes, therefore, do not violate the Establishment Clause of the First Amendment to the Constitution of the United States and are, consequently, constitutional.

D. *The constitutionality of the statutes here at issue is confirmed by the decision in* Wolman *v.* Walter.

Inevitably, the 1974 statutes were challenged on constitutional grounds by the same group of individuals who had mounted the attack in *Levitt.* At first the three-judge court in the Southern District of New York held the new statutes unconstitutional. Although it found a secular legislative purpose (the first part of a three-part test devised in earlier decisions of this Court, see *Lemon v. Kurtzman, supra,* 403 US 602, it also concluded that the "primary effect" of the new scheme was to advance religion, based on this Court's decision in *Meek v. Pittenger, supra,* 421 US 349. Writing for the Court, District Judge WARD said:

> "Absent the decision in *Meek v. Pittenger, supra*, we might have found defendants' arguments persuasive. However, in light of the decision in *Meek*, we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion" (414 F Supp 1174, 1179).

On appeal to this Court by defendants, the judgment appealed from was vacated and the case remanded for further consideration in the light of *Wolman v. Walter*, 433 US 229, decided June 24, 1977. Following remand, the same three-judge court sustained the constitutionality of the statute (Judge WARD dissenting) upon the decision of *Wolman, supra*, (461 F Supp 1123).

It seems from the foregoing history of this matter that at least in June 1977, when the case was remanded, the decision in *Meek v. Pittenger* was not regarded by a majority of this Court as conclusive on the present case.

The Court below explained its earlier decision in the present case by saying it had concluded that *Meek v. Pittenger* held that "substantial aid to the educational function of [sectarian] schools * * * necessarily results in aid to the sectarian school enterprise as a whole". In other words, no distinction could be drawn between the secular and religious dimensions of education provided in sectarian schools, and thus, both aided the sectarian enterprise.

The Court in *Wolman, supra*, held constitutional a variety of State-supported services and programs in Ohio for nonpublic schools, including textbooks, diagnostic health services, and testing. In considering the programs before the Court in *Wolman*, the majority set out the findings which must be made to sustain State programs relative to non-public schools (433 US 236):

> "In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."

In upholding the Ohio testing program, the Court specifically distinguished its decision in *Levitt v. Committee for Public Education and Religious Liberty, supra* (413 US 472), which had invalidated the previous New York State program, which included reimbursement for teacher-prepared tests. As to that case, the Court in *Wolman* stated (433 US 239, 240):

> "In *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because 'no means are available, to assure that internally prepared tests are free of religious instruction.' * * * *Id*, at 480.
>
> "There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.*, at 479-480, n7. The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, *Allen*, 392 U.S. at 245-246, and n.7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt*, 413 U.S., at 479-480, n.7; *Lemon*, 403 U.S., at 614. See App. 28. Cf. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement".

That decision provides the standard by which the statute here at issue should be measured, a standard by which the statute should be found constitutional.

The tests involved in the present statute are all State-prepared — there are no teacher-prepared examinations involved. The tests are a measuring device by which the State can assure that students in nonpublic schools are receiving an adequate secular education and that minimum educational standards are being met. The nonpublic school does not control the content of the test.

An examination of the tests involved further reinforces constitutionality of the program. The Regents examinations are State-prepared examinations utilized to test student achievement in 19 subjects at the secondary school level in both public and nonpublic schools. While they are graded in the schools, scoring keys and rating guides are provided by the State Education Department. In most subjects, the examinations are entirely objective and there is no element of teacher judgment involved. Only in English and Social Studies are there any essay questions, and there are severe limitations on the opportunity for subjective grading. For example, English composition questions must be selected from a subject matter list provided to the student by the State; the teacher cannot select topics or limit the choices from the list. Moreover, it is the competency of the writing *qua* English composition which is tested, not the content. Five percent of all examinations for each school are returned to the State Education Department for review to determine if errors in marking are being made. What little chance for subjective judgment in grading is available to a nonpublic school teacher is also available to the public school teacher grading the identical examination and does not provide an opportunity to influence the underlying subject matter of the questions so as to insert religious teaching into the examination process.

There are five basic competency tests required to be administered to students at certain grade levels. Four of those tests are completely objective and, indeed, can be machine marked, so that no subjective element can be inserted in their marking and the schools have no part in the development of the questions. The fifth test, which measures writing skills, allows for subjective judgment as to the answers, but once again no part is played by the teacher in developing the questions and thus no sectarian teaching goals can be inserted into the tests.

The Pupil Evaluation Program (PEP) Tests which are mandated in grades 3 and 6 and are optional in grade 9 test student achievement and progress in reading and mathematics. These tests are solely objective and can be machine, as well as hand, marked. The tests are used to measure Statewide, community and school trends in pupil achievement and are functionally related to Title I of the 1965 Elementary and Secondary Education Act (79 Stat. 27, 20 USC §236 *et seq.*).

The State also requires an annual report from all schools, both public and nonpublic, called the Basic Educational Data System (BEDS). This report compiles information as to staff, pupils and school facilities. A similar secondary school report is also required to be annually filed with the State Education Department.

Each school is required to keep attendance records and file an annual attendance report with the State Education Department. This report is within the State's sphere of interest to determine compliance with compulsory school attendance laws.

The Regents Scholarship and College Qualification Test has been used as a basis for Regents' diplomas and in awarding Regents' scholarships to New York State high school graduates; in addition the test is used as an entrance examination for various units of the State University of New York. These examinations are State-prepared and State-scored.

Copies of the tests and reports are attached as exhibits to the fact stipulation entered into by the parties on September 26, 1977 and filed with this Court.

Unlike the tests at issue in *Levitt*, the nonpublic school teachers have no input into the contents of any of the examinations used; only in one or two Regents examinations can any subjective judgment enter into grading the examinations, and even that is severely restricted by the answer keys and rating guides (see, e.g., Exh 27, Pts II and III, and Exh 31).

Consequently, the basis for invalidation of the statute in *Levitt*, i.e., the lack of available means "to assure that internally prepared tests are free of religious instruction," does not exist as to the tests for which reimbursement is provided by Chapters 507 and 508. Like the testing program held constitutional in *Wolman*, this program should be held constitutional here.

The majority below concluded that *Wolman* "must be viewed as rejecting the concept that State support for educational activities necessarily advances religion." The Court then gave consideration to whether the points of difference between the Ohio statute and the New York law were significant enough to render *Wolman* inapplicable. Again, the majority concluded that the risk of New York examinations being diverted to religious purposes "is altogether too insubstantial". Writing for the majority, Circuit Judge MANSFIELD said:

> " * * * The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services." (461 F Supp at 1128)

Turning to the attendance-taking feature of the New York statute (not present in *Wolman*), the majority found that record keeping is "essentially a ministerial task lacking ideological content or use * * * " (461 F Supp at 1130).

In short, the same three-judge District Court which had declared these statutes unconstitutional in 1976 on the strength of *Meek v. Pittenger, supra*, now finds persuasive distinctions in this Court's more recent *Wolman* decision which are sufficient to uphold the statutes. In *Wolman*, this Court has adhered to its position in earlier cases (not followed in *Meek*) which permits State aid to those parts of a sectarian school's educational activities which have only secular values of legitimate interest to the State and which aid "does not present any appreciable risk of being used to aid transmission of religious views."

The decision below is in accord with prior decisions of this Court as expressed in *Wolman v. Walter, surpa.*

CONCLUSION

The Judgment appealed from should be affirmed.

Dated:

Respectfully submitted,

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APPENDIX

APPENDIX

Full Text of Chapter 507, New York Laws of 1974, as Amended by Chapter 508, New York Laws of 1974

AN ACT

To provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that:

The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

To fill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being educated within their individual capabilities.

In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such

nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

§ 2. Definitions.

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 3. Apportionment.

The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the state-wide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

§ 4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§ 5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

§ 6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§ 7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a

qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

§ 8. Noncorporate entities.

Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate entity as may be designated for such purpose pursuant to regulations promulgated by the commissioner. A school which is a corporate entity may designate another corporate entity for the purpose of receiving apportionments made for the benefit of such school pursuant to this act.

§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.

§ 10. This act shall take effect July first, nineteen hundred seventy-four.

NOTE: Section 9 of the bill was added by Chapter 508 of the Laws of 1974.

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADAMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL AND ST. MICHAEL SCHOOL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

PAGE

Statutes and Regulation

Other

IN THE

Supreme Court of the United States

October Term, 1978

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

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Opinions Below

The majority and dissenting opinions of the three-judge District Court, upon which the Judgment appealed from is based, are set forth in the Appendix to this Brief and are reported at 461 F.Supp. 1123 *et seq.*

Constitutional Provision and Statute Involved

The First Amendment provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York,[1] entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data".

[1] Hereinafter referred to as Chapter 507.

Question Presented

Whether reimbursement of religiously-affiliated nonpublic schools for actual costs incurred by them in preparing state attendance and related reports and in administering standardized state-prepared examinations in secular subjects, which reporting and testing is done to ensure compliance with the New York Education Law and to ensure that pupils receive adequate instruction in secular subjects, is in conformity with the Establishment Clause.

Statement of the Case

The factual background of Chapter 507 requires a brief review of the earlier Mandated Services Act,[2] held unconstitutional in *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. 472 (1973). That Act provided for state reimbursement of nonpublic schools on a per-pupil allotment basis, rather than actual cost, for

> expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.[3]

[2] [1970] Laws of N.Y. ch. 138.

[3] *Id.,* § 2.

A three-judge District Court decided that "Chapter 138 violates the establishment clause of the First Amendment." *Comm. for Pub. Educ. & Religious Liberty v. Levitt,* 342 F. Supp. 439, 445 (S.D.N.Y. 1972). This decision was based upon the rationale that:

> . . . By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon,* "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* [*v. Board of Education,* 330 U.S. 1 (1947)] and [*Board of Education v.*] *Allen* [392 U.S. 236 (1968)] inapplicable. (342 F. Supp. at 444)

This Court affirmed, noting that two kinds of tests and examinations were covered by the Mandated Services Act, both "state-prepared" and "traditional teacher-prepared", and pointing out that the "overwhelming majority" were of the latter variety. *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. at 475. This Court cited verbatim the crux of the District Court's opinion set forth above[4] and affirmed its reasoning as follows:

> . . . Chapter 138 provides for a direct money grant to sectarian schools for performance of various "services." Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.
>
> We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment." *Lemon v. Kurtzman,* 403 U.S., at 618. But the potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.,* at 617, 619. Since the State has failed to do so here, we are left with no choice under [*Comm. for Pub. Educ. & Religious Liberty v.*] *Nyquist* [413 U.S. 756 (1973)] but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.[5]

In conclusion, however, this Court was careful to indicate that actual costs incurred by schools in performing secular services may be reimbursable. It stated:

> We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil

[4] *See* 413 U.S. at 478.

[5] 413 U.S. at 479-80. *See also id.* at 481.

> allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function. (413 U.S. at 482)

Chapter 507

In April 1974, the New York Legislature, acting pursuant to a specific proposal of the Regents[6] and guided by this Court's decision in *Levitt,* passed by overwhelming majorities[7] in both houses Chapter 507, which became law on May 23, 1974.[8]

Unlike the Mandated Services Act, Chapter 507 does not provide for reimbursement for "traditional teacher-prepared" tests and examinations.[9] Rather, Section 3 provides:

> The Commissioner shall annually apportion to each qualifying school . . . an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to

[6] *See* N.Y. State Educ. Dep't, *Major Recommendations of the Regents for Legislative Action—1974,* at 12 (Dec. 1973).

[7] In the Assembly, the vote was 134 to 10. *See* [1974] 1 J. N.Y. Assembly 1318. The vote in the Senate was 48 to 7. *See* [1974] J. N.Y. Senate 262.

[8] Chapter 508, adding Section 9, a severability provision, to Chapter 507, was enacted the same day.

[9] The elimination of the costs involved in administering these teacher-prepared examinations resulted in a drastically reduced appropriation—down from $28,000,000 a year to $8,000,000. *See* N.Y. State Educ. Dep't, *Major Recommendations of the Regents for Legislative Action—1975,* at 49 (Dec. 1974).

> be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

In addition, Chapter 507 differs from the Mandated Services Act in that Chapter 507 provides for reimbursement for actual costs expended, as distinguished from the per-pupil formula used in the Mandated Services Act.[10]

Section 5 of Chapter 507 requires that "[e]ach school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed." Section 7 provides that:

> No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.
>
> The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act

[10] In its opinion in *Levitt,* this Court pointed out that the Mandated Services Act

> contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses. (413 U.S. at 477) (footnote omitted)

> for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

Proceedings Prior to This Court's Order of June 27, 1977

The plaintiffs filed their complaint on June 20, 1974 against the Comptroller and the Commissioner of Education of the State of New York, seeking a declaratory judgment that Chapter 507 is violative of the Establishment Clause[11] and a permanent injunction against any state payments to religiously-affiliated schools. Thereafter, the five nonpublic schools, which are appellees herein, were permitted to intervene as defendants. The verified answers of each of these schools to the plaintiffs' interrogatories 5(a) and 5(g) showed that they do not discriminate on the basis of religion in the admission of students and employment of faculty.[12]

[11] Count II of the Complaint alleged a claim under the Free Exercise Clause [*see* Appendix, p. 14a], but this was not pressed in the District Court and is not urged in appellants' Brief in this Court.

[12] None of the four religiously-affiliated appellee schools requires obedience by its pupils to the doctrines, laws and dogmas of a particular faith, and none is an integral part of the religious mission of the church or group sponsoring it. *See* Responses of Intervenor-Defendants LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam to Plaintiffs' Interrogatories 5(c) and 5(e).

A three-judge District Court was convened and heard argument based upon the pleadings and the defendants' and the intervenor-defendants' answers to the plaintiffs' interrogatories. On June 21, 1976, the District Court decided that Chapter 507 was "unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools." The Court's opinion stated, in part:

> Absent the decision in *Meek v. Pittenger,* [421 U.S. 349 (1975)], we might have found defendants' arguments persuasive. However, in light of the decision in *Meek,* we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion.[13]

Judgment was entered on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools".

On June 27, 1977, after the state defendants and intervenor-defendants had appealed to this Court and while their jurisdictional statements were under consideration, this Court (three justices dissenting without opinion) entered an order vacating the District Court's injunction and remanding the case for reconsideration in light of the decision rendered that day in *Wolman v. Walter,* 433 U.S. 229 (1977). *Levitt v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-595) and *LaSalle Academy v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-713), 433 U.S. 902 (1977).

[13] *Comm. for Pub. Educ. & Religious Liberty v. Levitt,* 414 F. Supp. 1174, 1178 (S.D.N.Y. 1976).

Facts Stipulated Upon Remand to the District Court

Upon remand, the parties entered into a Stipulation of Facts[14] as to the nature of the activities reimbursable under Chapter 507 and the procedures followed by the nonpublic school personnel and by the State with respect thereto, and incorporating samples of the standardized state-mandated and prepared examinations, scoring guides, attendance-reporting forms and other materials involved under Chapter 507.

With respect to the activities of nonpublic school personnel incident to attendance records required to be maintained under Section 3211 of the New York Education Law, the Stipulation provides:

> . . . 23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N . . . is . . . Exhibit 34.
>
> 24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports; recording of attendance on record forms prepared to meet State specifications; ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers.

[14] Copies of this Stipulation comprise pages 24a-43a of the Appendix as well as the Appendix to the Motion of Appellee Schools to Dismiss or Affirm dated April 6, 1979 and filed herein. The exhibits to this Stipulation have been filed with the Clerk of this Court.

In addition, the State Education Department requires annually a Basic Educational Data System Report of Nonpublic Schools (BEDS)[15] which, as the District Court observed, "contains information regarding the student body, faculty, support staff, physical facilities and curriculum of each school." 461 F. Supp. at 1126.

With respect to administration of the standardized state-prepared examinations, which are given to pupils in public and nonpublic schools alike, the Stipulation provides, in part:

> 14. A number of standardized tests are provided by the Education Department to help improve the educational program offered in the schools of the State of New York. All tests and accessories are offered at no charge.
>
> 15. The Education Department has established a statewide Pupil Evaluation Program (PEP), a full testing program required of all pupils in grades 3 and 6 in the public and nonpublic schools in New York State. Tests for pupils in Grade 9 are also available for schools that wish to use them on an optional basis. The tests used in the program are standardized reading and mathematics achievement tests developed and published by the Education Departments and based on New York State courses of study: . . .
>
> 16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials;

[15] *See* Stipulation of Facts, paras. 17, 18, 28 and Exhibits 22 and 23.

proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

. . . 19. Regents examinations are end-of-course comprehensive achievement tests based on State courses of study for use in grades 9-12. . . .

20. Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collation of materials; proctoring of examinations; scoring of the examinations; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

Exhibit 33 to the Stipulation is a sample Deputy and Proctor Certificate which must be signed by each person "who assisted in the administration of Regents examinations", declaring that he or she "fully and faithfully observed the rules and regulations of those examinations".

Nonpublic schools seeking reimbursement must file prescribed forms with the State Education Department. These forms show precisely the method used to compute the schools' requests for reimbursement, together with apportionment forms showing the exact services rendered, time expended, and monetary charges. In addition, Section 176.2 of the Regulations of the Commissioner of Education requires that specific records be maintained by

the schools with respect to underlying support data so that state audits can be carried out pursuant to Chapter 507 quickly and with a minimum of direct involvement of state employees with the schools or their personnel.

Under Chapter 507, the four religiously-affiliated appellee schools have been reimbursed for the 1974-75 year as follows:

Expenditure Item	*LaSalle*	*LILHS*	*St.M.*	*Rambam*
Pupil Evaluation Program	$ 305.00	$ 362.05	$ 389.27	$ 552.79
Basic Educational Data Services	101.00	47.74	5.52	66.83
Regents Examinations	119.00	459.59		
Attendance Records	11,957.00	8,934.92	5,307.07	5,102.62
Secondary School Reports	87.00	53.79		
Other	507.00			
Total	$13,076.00	$9,838.09	$5,701.86	$5,722.24

The Forms SA-186 and SA-187, which the schools were required to file in conformity with Chapter 507, set forth in detail how these figures were arrived at.[16] The Form SA-187 shows that the aggregate costs of LaSalle Academy for all instructional and attendance-reporting salaries and fringe benefits, for example, were $750,379.00 in contrast to the $13,000 reimbursed by the State and that the aggregate costs of St. Michael School, to take another example, were $179,219.19 as opposed to the $5,700 in reimbursement. Clearly, the state reimbursement represents a very small percentage of the schools' total expenses.

[16] *See* Stipulation of Facts, Exhibits 57-60 and the Responses of Intervenor-Defendants LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam to Plaintiffs' Interrogatories which are on file in the Office of the Clerk of the Court as part of the Record on Appeal.

The District Court's Decision Upholding the Constitutionality of Chapter 507

Upon this Court's remand to the District Court for further proceedings in light of the *Wolman* decision, plaintiffs moved for a preliminary injunction against any payments to religiously-affiliated schools under Chapter 507. On September 14, 1977, the District Court, after argument, ordered that, during the pendency of the lawsuit, all such payments were to be paid to, and held in escrow by, the Comptroller of the State of New York.[17] Thereafter, upon receipt of the Stipulation of Facts described above, and after briefing and argument, the District Court held (Judge Ward dissenting) that Chapter 507 does not violate the Establishment Clause.

The majority opinion by Judge Mansfield found that Chapter 507 "clearly manifests a secular legislative purpose"[18], and, based on a close analysis of the various testing and attendance materials and the respective activities of state and nonpublic school personnel in connection therewith, found that "any benefit to religious indoctrination" was not the primary effect of the statute, but was "at best 'indirect' and 'incidental' to the secular value of the exams". 461 F. Supp. at 1129. The District Court further rejected the contention that the statute was invalid because it involved direct monetary payments to religiously-affiliated schools:

> . . . Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403

[17] *See* Appendix, p. 6a.

[18] 461 F. Supp. at 1126.

> at 621; and *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams. *Id.*
>
> * * *
>
> In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind. (461 F. Supp. at 1130)

With respect to reimbursement for attendance record-keeping,[19] the District Court found that this is "essentially a ministerial task lacking ideological content or use"[20] and

[19] These records (*see* Exhibit 35 to the Stipulation of Facts) are maintained on a daily basis, reflecting pupil attendance during the day, rather than at specific classes. In view of the requirements as to secular subjects required to be taught in New York's nonpublic schools, any benefit accruing because of a pupil's attendance at a religion class in the course of a day principally devoted to secular subjects is incidental to the recognized need to maintain such attendance records for clearly secular purposes.

[20] 461 F. Supp. at 1130.

not susceptible of challenge either under the *Meek v. Pittenger* rationale that "any state assistance to the educational process advances religion" or on the theory that such reimbursement "frees up" funds for the religious, as contrasted to the secular, aspects of the schools. *Id.*

The District Court analyzed with particular care this Court's recent decisions and expressed the view that this Court's decision in *Wolman v. Walter,* 433 U.S. 229 (1977), rejected the theory, set forth in *Meek v. Pittenger,* 421 U.S. 349 (1975), that "State support for educational activities [in religiously-affiliated schools] necessarily advances religion". 461 F. Supp. at 1128.

With respect to the administration of the state-prepared examinations, the "overwhelming majority" of the Regents comprehensive achievement examination questions, as found by the District Court, consist of "objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination." *Id.* Although some of the examinations may also include "among scores of multiple choice questions" an essay-type question, "which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and grade the answer accordingly"[21], the District Court found that

> the likelihood of such an event is so minimal and the State procedures designed to guard against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or

[21] 461 F. Supp. at 1128. Exhibit 31 to the Stipulation is a sample of the type of the state-prepared rating guide which accompanies Regents examinations, setting forth the State's guidelines for the grading of any essay question.

> otherwise, to inculcate students in the religious precepts of the sponsoring church." *Levitt I, supra,* 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures . . . provide an adequate check against any misuse of essay questions.
>
> In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. (461 F. Supp. at 1128-29) (footnote omitted)

With regard to the Pupil Evaluation Program (PEP), the District Court concluded that

> the tests administered . . . consist entirely of objective, multiple choice questions which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State. 461 F. Supp. at 1128.

With regard to the Regents Scholarship and College Qualification Test (RSCQT), the District Court found that

> the risk of their being used for religious purposes through grading is non-existent, since they are corrected entirely by State Education Department personnel. *Id.*

Having determined that the "principal or primary effect" part of the tripartite test applied in numerous cases from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to *Wolman v. Walter* remains determinative and that Chapter 507 meets this test, the District Court proceeded

to consider the plaintiffs' claim that the statute excessively entangles the State in the administration of religiously-affiliated institutions, an issue which it did not need to reach in its prior decision. In so doing,[22] the Court held that the activities reimbursed under Chapter 507 "did not pose any substantial risk of such entanglement"[23] and explained:

> The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision. (461 F. Supp. at 1131)

Judge Ward dissented on the basis that *Wolman* does not represent any change in the view expressed in *Meek* to the effect that any direct aid to religiously-affiliated schools necessarily advances their religious aspect and is

[22] The District Court dismissed the possibility of political entanglement, which it observed "has not been suggested by the parties" as posing a factor of sufficient consequence to warrant invalidation of the legislation. *See* 461 F. Supp. at 1131, n.9.

[23] *See* 461 F. Supp. at 1130.

unconstitutional. *See* 461 F. Supp. at 1133-35. He further was of the view that Chapter 507 involves excessive administrative entanglement between church and state. *See* 461 F. Supp. at 1135-38.

Following the entry of Final Judgment and the filing of appellants' Notice of Appeal to this Court, the state defendants sought clarification as to the status of the District Court's escrow order of September 14, 1977. On February 5, 1979, the District Court continued this order in effect for a period of 60 days to permit the plaintiffs time to file their Jurisdictional Statement,[24] and it informed them that any application for a further extension of the escrow order or for a stay against payments under Chapter 507 would have to be directed to this Court. On March 21, 1979, after filing their Jurisdictional Statement, appellants made a motion in this Court for a stay of the District Court's Judgment. The motion was denied on April 2, 1979, with Mr. Justice Powell taking no part in the consideration thereof. 99 S.Ct. 1785 (1979).

On June 11, 1979, this Court noted probable jurisdiction. 61 L.Ed.2d 295 (1979).

[24] *See* Appendix, p.7a.

Summary of Argument

In enacting Chapter 507, the New York Legislature adhered strictly to the dictates of this Court's decision in *Levitt v. Comm. for Pub. Educ. & Religious Liberty,* 413 U.S. 472 (1973). In so doing, it eliminated the causes for constitutional concern expressed in that case. Reimbursement of nonpublic schools for the actual costs incurred in filing various required attendance reports and forms with the State and in administering standardized state mandated and prepared examinations fulfills the secular purpose of ensuring that nonpublic school pupils receive a secular education in compliance with the New York Education Law, and both the content of the tests and the method of their administration preclude any realistic claim that the religious aspects of the schools are thereby advanced.

This Court's decision in *Wolman v. Walter,* 433 U.S. 229 (1977), should be viewed as rejecting the concept that any state support for educational activities necessarily advances religion. The Court has repeatedly rejected claims that otherwise permissible programs are invalid because they involve a financial payment which may have the effect of freeing other funds for use in furthering religious aspects of nonpublic schools.

Compliance with and enforcement of Chapter 507 do not pose an unacceptable risk of excessive entanglement between church and state in view of the requirements for submission by the schools of vouchers and supporting data as to actual costs incurred, on the basis of which any State audit can be conducted with minimal, if any, interference or involvement in the educational or religious activities of the schools.

Chapter 507 is in all respects consistent with this Court's tripartite test, as most recently applied in *Wolman v. Walter,* and the Judgment of the District Court should be affirmed.

ARGUMENT

Chapter 507 Does Not Advance Religion, Nor Does It Entail Excessive Entanglement Between Church and State

The fundamental issue presented by this appeal is whether, as indicated in *Meek v. Pittenger,* 421 U.S. 349 (1975), any direct payments, as under Chapter 507, to a religiously-affiliated school are prohibited on the ground that they advance religion—or, as the District Court reasoned and as we urge, the proper test is whether the principal or primary effect of such aid is the advancement of religion—a test applied in numerous cases from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to *Wolman v. Walter,* 433 U.S. 229 (1977).

A further issue is whether Chapter 507, as administered by the State Education Department, involves excessive entanglement between church and state. A subsidiary issue, not raised below, is whether the statute gives rise to political divisiveness.

The District Court concluded, correctly we submit, that Chapter 507 fully complies with the tripartite test[25] ap-

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[25] In view of the recognized and legitimate interest on the part of the State of New York in ensuring adequate levels of secular instruction and attendance in nonpublic schools closely regulated as to secular curriculum and related matters, we submit that the District Court's conclusion that Chapter 507 has a secular legislative purpose is entirely correct. *See* 461 F.Supp. at 1126. Appellants do not seriously contend otherwise. *Cf.* Brief for Appellants, pp. 8-9.

plied most recently in *Wolman v. Walter* and dismissed the complaint.

In *Meek,* this Court indicated a possible modification of the "principal or primary effect" portion of this test in holding (by a divided Court) that Pennsylvania's statutory program for the loan of secular instructional material and equipment to nonpublic schools violated the Establishment Clause because it aided the "integrated secular and religious", "inextricably intertwined" education at these schools. 421 U.S. at 366. This Court's opinion stated:

> . . . For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S., at 781-783, and n.39, and thus constitutes an impermissible establishment of religion. (421 U.S. at 366)

Several years later, in *Wolman,* this Court considered the constitutionality of an Ohio statute[26] providing, among other things, for the supply by the State to nonpublic schools of standardized tests and scoring services, identical to those used in the public schools. In an

[26] Ohio Rev. Code § 3317.06 (1976). The biennial appropriation under this statute was $88,800,000. *See* 433 U.S. at 233.

opinion by Mr. Justice Blackmun (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Powell) that section was found to be constitutional:[27]

> In *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction." *Id.* at 480.
>
> There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.* at 479-480, n.7. The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, *Allen,* 392 U.S., at 245-246, and n.7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt,* 413 U.S. at 479-480, n.7; *Lemon,* 403 U.S., at 614. See App. 28. Cf. *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt.* Simi-

[27] Mr. Justice White and Mr. Justice Rehnquist concurred in the judgment with respect to the testing and scoring services. *See* 433 U.S. at 255.

larly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that § 3317.06(J) is constitutional. (433 U.S. at 239-41) (footnote omitted)

I

In analyzing this Court's decisions in *Meek* and *Wolman,* the District Court herein concluded that:

> Although *Wolman* does not expressly renounce *Meek's* theory that aid to a sectarian school's education activities is *per se* unconstitutional, it does revive the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views. See 433 U.S. at 240, 244, 247-48, 251, 254. (461 F.Supp. at 1127) (footnotes omitted)

We submit that this conclusion is correct as a matter of constitutional law and as a matter of practical educational imperatives. To apply the *Meek* approach is to impose on nonpublic schools an inflexible *per se* rule against any aid except in the limited area of general health and welfare involving police and fire protection, health care and the like.

This approach, by no means supported by the history of the First Amendment, would effectively eliminate any meaningful public assistance to the secular educational activities and progress of the millions of children who attend nonpublic schools. To apply the *Meek* approach is to place nonpublic schools and their pupils at a disadvantage in maintaining parity, wholly apart from excellence, with public schools and their pupils. This would not only be wrong as a matter of constitutional law, it would also constitute educational discrimination against students in religiously-affiliated schools and a hostile attitude toward fundamental educational needs which are met by nonpublic schools.[28] As Mr. Justice Powell observed in his opinion in *Wolman:*

> Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek v. Pittenger,* 421 U.S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education v. Allen,* 392 U.S. 236 (1968), and even perhaps *Everson v. Board of Education,* 330 U.S. 1 (1947). The persistent

[28] In 1978, of 3,778,039 elementary and secondary school pupils in New York, 588,258 or 15.6 percent were being educated in religiously-affiliated schools. *See* N.Y. State Educ. Dep't.—Information Center on Educ., *Nonpublic School Enrollment and Staff—New York State 1977-78,* pp. 3, 6. This percentage is higher in metropolitan areas. *Cf. id.* at 7-8.

With respect to urban areas, 75 percent of the children in Roman Catholic elementary schools in Manhattan, for example, are black or Hispanic; in the Bronx, more than 50 percent are black or Hispanic. *See, e.g.,* N.Y. Times, June 3, 1979, § 1 at 34, col. 3.

> desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. (433 U.S. at 262)

Prior decisions of this Court have looked, not to whether *any* aid was given to nonpublic schools, but rather whether the primary effect of such aid was to advance or inhibit religion. We submit that this approach, reflected most recently in *Wolman,* is correct and will provide this Court with flexibility in dealing with future cases without endangering Establishment Clause values.

In addition, the *Meek* approach that any substantial aid to the secular functions of the religiously-affiliated schools necessarily aids the religious aspects of those schools must be premised on the theory that such aid frees other funds for use in the religious areas of the schools' activities. Yet this Court has repeatedly rejected claims that otherwise permissible programs are invalid because they involve a financial payment. For example, in *Tilton v. Richardson,* 403 U.S. 672 (1961), Chief Justice Burger stated in his lead opinion:

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts,* 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. (403 U.S. at 679)

In *Hunt v. McNair,* 413 U.S. 734 (1973), Mr. Justice Powell pointed out that

> the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. (413 U.S. at 743)

In *New York v. Cathedral Academy,* 434 U.S. 125 (1977), Mr. Justice Stewart stated the matter as follows:

> . . . [T]his Court has never held that freeing private funds for sectarian uses invalidates secular aid to religious institutions . . .[29]

Indeed, in *Meek v. Pittenger,* 421 U.S. 349 (1975), this Court reminded us that

> it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. (421 U.S. at 359)

The correct test of constitutionality is whether the *principal* or *primary effect* of a statute is the advancement of religion, and not whether there is *any* such effect. Certainly, after *Wolman,* there should not be any

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[29] 434 U.S. at 134, citing *Roemer v. Bd. of Pub. Works of Maryland,* 426 U.S. 736, 747 n.14 (1976).

claim that non-ideological state-required programs such as the maintenance of attendance records or the use of standardized state-prepared examinations in nonpublic schools offend the Establishment Clause, nor should there be any claim that use of public funds in support thereof is unconstitutional. As the District Court pointed out in a very practical way:

> . . . In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind. (461 F.Supp. at 1130)

Given the fact that, under *Wolman,* nonpublic schools can receive non-ideological testing materials paid for by the state, there is no legitimate reason under the First Amendment why the state cannot reimburse nonpublic schools for the expense which they incur in administering these tests.

Certainly, the fact of direct monetary payments to the schools is relevant, but it is by no means the end of the inquiry. Unless one is to accept the *Meek* approach, the proper test is whether such payments, as opposed to payments in terms of materials or other non-cash benefits, have the principal or primary effect of advancing religion. The District Court correctly rejected the *Meek* approach:

> The second distinction between the Ohio statutory provision upheld in *Wolman* and the New York Statute is that the latter, unlike the former, authorizes direct reimbursement to non-public schools for their administration of the exams and for attendance-taking. Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403

> [U.S.] at 621; *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams. (461 F.Supp. at 1129)

Nor can there be any claim that Chapter 507 advances religion by permitting religious intrusion into the grading of the state-prepared standardized examinations. The RSQCT examinations have been graded by State personnel. The PEP examinations consist of objective, multiple choice questions which can be graded by machine or, if by hand, "afford the schools no more control over the results than if the tests were graded by the State". 461 F.Supp. at 1128. Similarly, the Regents' examinations, for the most part, consist of multiple choice questions. As to the few questions, the District Court found that the state procedures, including guidelines for grading, are adequate to guard against serious inconsistencies which conceivably

might arise from an individual grader's religious (or other) interests.[30] As the District Court concluded:

> In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. (461 F.Supp. at 1129)

Similarly, the District Court's conclusions as to the non-ideological nature and effect of the attendance and related reports is correct, as a matter of constitutional law and common sense.[31] It is indeed difficult, except under the approach taken in *Meek,* to find that "head counts" have anything to do with the transmission of educational information or values—secular or sectarian. These reports, and the activities incident to them, involve "ministerial task(s) lacking ideological content or use"[32] and cannot properly be considered as having any effect—much less a primary effect—of advancing religion.

We therefore submit that the "primary effect" of reimbursement under Chapter 507 for the expense of administering state-prepared standardized examinations and of

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[30] 461 F.Supp. at 1129. Furthermore, the pupils do not see their papers after they have been graded since the papers are returned to the State Education Department.

[31] The record showed and the District Court found that:

> The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service. (461 F.Supp. at 1126)

[32] 461 F.Supp. at 1130.

compiling state-required attendance and related reports is the furtherance of the required secular education of children in nonpublic schools.

II

Having determined that Chapter 507 does not advance religion, the District Court concluded that the activities reimbursed by the statute "do not pose any substantial risk of . . . entanglement". 461 F.Supp. at 1130 (footnote omitted). This conclusion is correct. The State's activities with respect to reporting and testing do not involve intrusion into the daily activities of the nonpublic schools except to receive by mail attendance and related reports and to arrange for the administration of the state-prepared examinations by the schools and the transmission of test papers and results to the Education Department. As the District Court noted:

> The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. (461 F.Supp. at 1131)
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> * * *
>
> . . . [T]he opportunity for religious indoctrination in the grading of end-of-course regents examinations is virtually nil. As we have noted, these examinations, given but once a year in any one class, require the grader to exercise subjective judgment only in connection with one, or possibly two, questions out of scores. These questions are prepared by the State, which provides instructions to guide the grading of

> essay questions. Clearly, the potential for advancing religion associated with the subsidized activities in this case is vastly inferior to that which the Court faced in *Lemon*. (461 F.Supp. at 1131, n.8)

Similarly, there is no intrusion by the State into the schools as a result of the process of submitting vouchers reflecting actual costs and the audit of such vouchers. The District Court concluded:

> . . . Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision. (461 F.Supp. at 1131)

Contrary to appellants' claim at pages 15-16 of their Brief, Chapter 507 does not involve any "continuing state surveillance of church school operations". It simply involves a relationship whereby the State, as the contractor, has the right to verify the "actual cost" of the required services which the schools perform under Chapter 507. The District Court concluded that this can hardly be a complicated audit because the "highly routinized" activities involved would permit the State to determine readily if any school's reimbursement vouchers varied materially from those submitted by other similar schools. 461 F.Supp. at 1131.

Thus, any administrative entanglement between church and state is at most minimal, is tailored to the simple verification requirement imposed on any vendor to the State, and is hardly the "excessive entanglement" required to invalidate a statute. *See, e.g., Lemon v. Kurtzman*, 403 U.S. at 621.

III

Appellants attempt to overcome the sound reasoning of the majority of the District Court by referring to two cases decided by this Court after its decision in *Wolman*, namely, *New York v. Cathedral Academy*, 434 U.S. 125 (1977), and *NLRB v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979). Neither case is apposite.[33]

In the later case, this Court simply determined that Congress did not contemplate, in enacting the National Labor Relations Act, that the NLRB would require religiously-affiliated schools to grant recognition to unions as bargaining agents for their teachers, and noted the very real potential for administrative entanglement if such were the case.

Cathedral Academy involved an effort by the New York Legislature to correct an inequity it considered to have existed as a result of the timing of the entry of the District Court judgment in *Comm. for Pub. Educ. & Re-*

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[33] Appellants' reliance on *Byrne v. Pub. Funds for Pub. Schools of New Jersey*, 61 L.Ed.2d 273 (1979), is also misplaced because it was a tax credit case which simply applied the prior decision of this Court in *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and, arguably, in *Pub. Funds for Pub. Schools of New Jersey v. Marburger*, 358 F.Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

ligious Liberty v. Levitt, 342 F. Supp. 439 (S.D.N.Y. 1972). This Court held that the original constitutional infirmity in the Mandated Services Act, namely, reimbursement of expenses incurred in administering teacher-prepared exams, was retained in the new statute,[34] thereby also retaining either the same potential advancement of religion through such examinations or potential entanglement of the State with nonpublic schools in determining through litigation in the state courts the ideological or non-ideological content of those examinations. *See New York v. Cathedral Academy,* 434 U.S. at 133.

Nor is there any validity to Judge Ward's thesis herein, based on his suggested extension of the rationale of *Cathedral Academy,* that the Establishment Clause requires frequent review of the testing materials to ensure neutrality of the State aid. *See* 461 F. Supp. at 1135-38. This fails to take into account the basic difference between the teacher-prepared testing materials involved in *Cathedral Academy* and previously in *Levitt* and the state-prepared materials involved here. The District Court majority stated in this regard:

> We see no indication in either of these decisions [*Levitt* and *Cathedral Academy*] that the State would have to make individual determinations regarding the neutrality of State-prepared examinations. Indeed, in *Wolman* the Court recognized as a general rule that the performance by state personnel of their functions outside of the sectarian school environment does not present any significant danger of promoting religious values, even when their functions relate directly to the educational process. 433 U.S. at 247-48. Accordingly, in the absence of any reason for believing that State-prepared examinations here might

[34] [1972] Laws of N.Y. ch. 996.

> be radically changed to elicit or encourage religious views, our determination that the examinations do not foster religion should be definitive. (461 F. Supp. at 1129, n.7)

We therefore submit that there is no basis for appellants' strained claims of administrative "entanglement".

IV

Appellants' Brief raises for the first time the argument that Chapter 507 is unconstitutional because of claimed "political entanglement" or "divisiveness". No evidence is offered in support of this claim, and the argument rests simply on an extended quotation from *Lemon v. Kurtzman,* 403 U.S. at 622-24, together with the conclusory statement that:

> . . . The combination of potential for political entanglement together with the administrative entanglement necessary to ensure that the state-compensated services do not advance religion compels the conclusion that Chapter 507, with or without Section 7, violates the Establishment Clause.[35]

This argument is erroneous and, also, should not be considered by this Court in view of appellants' failure to raise it below, as specifically noted by the District Court.[36]

[35] Brief for Appellant, pp. 17-18.

[36] *See* 461 F.Supp. at 1131, n.9. Absent special circumstances, this Court will not consider issues not raised initially below. *E.g., Youakim v. Miller,* 425 U.S. 231, 234-36 (1976); *Singleton v. Wulff,* 428 U.S. 106, 119-21 (1976). Appellants show no exceptional circumstances or danger of manifest injustice which would justify a departure from this basic principle of the Court's appellate jurisdiction.

In any event, appellants' belated claim of political divisiveness furnishes no basis for invalidating Chapter 507. There is absolutely no evidence that Chapter 507 or any appropriations for it have engendered any political strife along religious lines or, indeed, any other lines. The statute was first enacted by very substantial majorities of both houses of the New York Legislature in 1974,[37] and appropriations have been enacted thereafter on a routine basis. Indeed, in view of the limited nature of the services reimbursed under Chapter 507, the appropriations have remained constant.

The "political divisiveness" concept remains unsettled and has a very real potential for conflict with other First Amendment rights and values. It therefore should not be invoked lightly where, as here, there is nothing more than speculation on the part of appellants and a rejection of that speculation by the District Court. As to such speculation, the proper answer is that given by Mr. Justice Powell in *Wolman:*

> . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. (433 U.S. at 263)

[37] *See supra*, p. 6, n.7 and accompanying text.

Conclusion

In view of the foregoing, the Judgment appealed from should be affirmed.

Dated: New York, New York
September 14, 1979

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Three-Judge Court

74 Civ. 2648 RJW
Opinion No. 47973

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOK, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-Defendants.

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Before:

MANSFIELD, *Circuit Judge,*
LASKER and WARD, *District Judges.*

MANSFIELD, *Circuit Judge:*

For the second time we are required to pass upon the constitutionality of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("the Statute"), which authorizes the State to reimburse private schools for the cost of performing certain state-mandated pupil testing and record keeping. The statute has its background in *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973) (*Levitt I*), where the Supreme Court struck down an earlier New York statute on the same subject as violative of the First Amendment's Establishment Clause, applicable to the states through the Fourteenth Amendment, on the grounds that it authorized State financing of tests prepared by sectarian school teachers which might be used for religious instruction and that the Statute had no auditing provisions designed to insure that sectarian schools would be reimbursed by the State only for secular services.

In 1974 the New York legislature responded by enacting the Statute presently under review, which sought to remedy the features found objectionable by the Supreme Court by providing for State preparation of the tests and auditing procedures to assure that private schools would be reimbursed only for these State-mandated services. Thereafter, in *Committee for Public Education and Religious Liberty v. Levitt,* 414 F. Supp. 1174 (1976) (*Levitt II*), we held that despite these changes the amended Statute did not pass muster under the Establishment Clause.[1] In doing so we relied heavily on *Meek v.*

[1] The plaintiffs' complaint also alleged that the Statute violated the Free Exercise Clause. That claim was not pressed in the first hearing of the case, and our decision on the Establishment Clause made it superfluous. The plaintiffs have not pressed the theory in the argument following remand, so

Pittenger, 421 U.S. 349 (1975), which postdated *Levitt I.* One year after our decision the Supreme Court decided *Wolman v. Walter,* 433 U.S. 229 (1977), following which it vacated our judgment in *Levitt II* and remanded the case for reconsideration in light of *Wolman.* Three justices voted to affirm our decision. 433 U.S. 902 (1977).[2]

Following remand we held an evidentiary hearing to receive proof relevant to the issues. With commendable cooperation the parties succeeded in agreeing upon the pertinent evidence which was then furnished to us in the form of a stipulation of facts and exhibits. Since *Wolman* has in our view relaxed some of *Meek's* constitutional strictures against state aid to sectarian schools we now conclude, upon application of *Wolman's* standards to the record before us, that amended Chapter 507 may be upheld as constitutional.

The amended Statute, which became effective July 1, 1974, provides for reimbursement to private schools of the "actual cost" of complying with State requirements for public attendance reporting and the administration of State-prepared standardized examinations such as Regents examinations and the pupil evaluation program. These reports and tests are required of public and private schools alike and are designed to improve the educational program offered in New York schools.

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we have not addressed it. We do note that the Supreme Court has rejected previous attempts to invalidate public financial assistance to sectarian schools under the Free Exercise Clause. *Tilton v. Richardson,* 403 U.S. 672, 689 (1971); *Board of Education v. Allen,* 392 U.S. 236, 248-49 (1968).

[2] The vote of the other six Justices to vacate and remand does not express an opinion on the merits. See *Hunt v. McNair,* 413 U.S. 734 (1973).

The Statute authorizes reimbursements for two categories of services: the administration of State-prepared examinations and the execution of State-required reporting procedures. The State prepares a large number of examinations for use in evaluating the quality of the education received in New York schools and the abilities of individual students. At the present time, most of these tests are administered within one of three major examination programs. First, there is the Pupil Evaluation Program (PEP), consisting of standardized reading and mathematics achievement tests. These tests must be administered to all students in grades 3 and 6. Tests for ninth grade students are also prepared for use by schools on an optional basis. These tests are entirely multiple-choice, objective examinations and can be graded by hand or machine. Complete instructional manuals for giving and scoring the examinations are furnished to the school by the State. The scores are returned by school personnel to the State Education Department.

The second battery of tests are the comprehensive achievement tests (Regents "end-of-the-course" examinations) based on State courses of study for use in grades 9 through 12. Presently provided in 19 subjects,[3] these tests consist largely or entirely of objective questions with multiple-choice answers. Some of the examinations contain one or two essay questions or mathematical problems involving extended answers, which, of course, cannot be graded mechanically. Detailed instructional manuals are furnished by the State to schools for the administration

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[3] Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science; English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish.

of these exams and rating guides for their scoring of them. Each school is required to submit the passing and failing papers in certain subjects to the State Education Department for review. After the March/April and August exam dates, schools return all completed exam papers. In January and June a random sampling procedure is used by the State to select completed examination papers for review.

The third principal set of examinations is the Regents Scholarship and College Qualification Test (RSCQT), which has been used as a basis for awarding scholarships to New York high school students and for admitting students to various units of the State University. All answer papers for the RSCQT are scored at the State Education Department.

The Statute also authorizes reimbursements to private schools for the cost of preparing informational reports required by State law. Each year, private schools must submit to the State a Basic Educational Data System (BEDS) report. This report contains information regarding the student body, faculty, support staff, physical facilities, and curriculum of each school. Schools are also required to submit annually a report showing the attendance record of each minor who is a student at the school. N.Y. Educ. Law § 3211 (McKinney).

Schools which seek reimbursement must "maintain a separate account or system of accounts for the expenses incurred in rendering" the reimbursable services, and they must submit to the N.Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. Chapter 507, as amended, §§ 4-5. Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attributable to administration of the examinations

and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims. §§ 6-7. The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately. § 7. It is estimated that the reimbursements to private schools under the Statute will amount to $8,000,000 to $10,000,000 a year.

The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service. However, the total amount paid for these attendance-taking services amounted to only approximately 1% to 5.4% of the total amount budgeted by the schools for salaries and fringe benefits.

Discussion

The late Justice Harlan once observed that "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should

govern their application." *Walz v. Tax Commission,* 397 U.S. 664, 694 (1970). However, in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court established three criteria for a constitutional grant of State assistance to sectarian institutions: (1) the assistance program must have "a secular legislative purpose," (2) it must not have a "primary effect" of advancing or inhibiting religion, and (3) it must not excessively entangle the government in the affairs of sectarian institutions.

This now familiar tripartite test may have given some orderliness to Establishment Clause analysis, but for the most part it has simply identified more precisely the areas of uncertainty. Unfortunately, Justice Harlan's observation is as appropriate now as it was in 1970. We still face confusing and imprecise dictates. However, in such additional light as is shed by *Wolman,* we believe that the Statute here does not transgress the "blurred, indistinct and variable" limitations imposed upon federal and state governments by the Establishment Clause. 403 U.S. at 614.

As in *Levitt II,* we can pass quickly over the first leg of the Establishment Clause test. The statute clearly manifests a secular legislative purpose. See 414 F. Supp. at 1178. The central issue, as frequently happens in cases involving the Establishment Clause, is whether the Statute has a "primary purpose" (which includes a "direct and immediate effect," *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 783 n.39 (1973)), of advancing religion. In *Levitt II* we concluded that *Meek v. Pittenger, supra,* virtually mandated our holding that the Statute had such an effect, since the Supreme Court there ruled that "substantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a

whole." If, as seemed to be the case, the Court considered the secular and religious dimensions of education provided in sectarian schools to be inseparable, it appeared to us to follow that direct aid to such schools, "even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity." 421 U.S. at 366. We reasoned that since administration of examinations and record keeping are "as much a part of the educational function of private schools as classroom instruction in secular subjects," the State subsidies for these secular functions aided the sectarian enterprise as a whole and thereby directly advanced religion. 414 F. Supp. at 1179-80.

The concept that religion so pervades lower sectarian schools that even wholly secular instruction or equipment is always subject to the risk of religious orientation, rendering separation of secular and religious educational functions extremely difficult, has repeatedly been posed by the Supreme Court as an inherent problem faced in determining the constitutionality of state aid to sectarian schools. See *Lemon v. Kurtzman,* 403 U.S. 602, 618-19 (1971); *Levitt I, supra,* 413 U.S. at 480; cf. *Tilton v. Richardson,* 403 U.S. 672, 680-81 (1970) (this concept inapplicable to church-affiliated colleges). It appeared to us that in *Meek* the Court, in lieu of a case-by-case analysis of evidence to assess the degree of risk that state aid might be used for religious purposes, was establishing a *per se* rule prohibiting *any* state aid to educational activities carried out in sectarian schools, except for the loan of textbooks to students, which was upheld in *Board of Education v. Allen,* 392 U.S. 236 (1968). Indeed Justice Stewart observed in his plurality opinion that the "diminished probability" that religious doctrine might

become intertwined with secular instruction would not render state aid permissible as long as the potential existed. 421 U.S. 370-71. Applied consistently, *Meek* would allow only state aid coming under the mantle of "general welfare" programs serving the health and safety of school children.[4] See *Wolman, supra,* 433 U.S. at 262 (Powell, J., concurring in part and dissenting in part).

Although *Wolman* does not expressly renounce *Meek's* theory that aid to a sectarian school's education activities is *per se* unconstitutional,[5] it does revive the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.[6] See 433 U.S. at 240, 244, 247-48, 251, 254. It is this concept which we apply to the provisions of the statute before us.

In *Wolman* the Court upheld a section of an Ohio statute authorizing expenditure of State funds:

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[4] *Meek* did sustain the constitutionality of State expenditures for secular school textbooks to be loaned to sectarian school children or their parents. Such assistance, first sanctioned in *Allen, supra,* would be indefensible under a strict application of *Meek's* rationale. In *Wolman* the Court indicated that *Allen* is now followed solely in deference to *stare decisis* and, consequently, is limited to its facts.

[5] Indeed, Justice Blackmun's opinion for the Court in *Wolman* recites some of Justice Stewart's sweeping language in *Meek,* 433 U.S. at 249-50.

[6] Of course, this certainty must be achieved without an excessive entanglement of the State with the sectarian institution. We examine the entanglements issue separately, *infra,* pp. 16-17.

> "To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in public schools of the state." Ohio Rev. Code Ann. § 3317.06(j) (Supp. 1976).

The State of Ohio furnished the tests which were administered and scored by state personnel. Justice Blackmun reasoned that as the sectarian schools were unable to control the content or result of state-prepared examinations, there was no substantial danger that the exams would be used for religious teaching. 433 U.S. at 240. If, as the Court had asserted in *Meek,* the secular and religious dimensions of sectarian school education were inseparable, the examinations thus provided and graded by the State would have furthered religious education, even though they covered only secular subjects. *Wolman,* then, must be viewed as rejecting the concept that State support for educational activities necessarily advances religion.

In the present case all tests provided under the Statute, like those supplied under the Ohio law, are prepared by the State. However, except for the RSCQT exams, which are graded exclusively by personnel of the State Education Department, the tests furnished by New York State, unlike those supplied under the Ohio statute, are administered and graded by sectarian school personnel, for whose services in performing this task and in taking attendance the private schools are reimbursed by the State. The question, therefore, is whether these features of the New York law represent a sufficient distinction from *Wolman* to render it inapplicable and to call for nullification of the Statute. We think not. Although these features render the constitutionality of

the New York Statute a closer question than that presented by the Ohio law in *Wolman,* the risk of the New York examinations or services being diverted to religious purposes is altogether too insubstantial to require a departure from *Wolman.* The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services.

Turning first to the RSCQT examinations, the risk of their being used for religious purposes through grading is nonexistent, since they are corrected exclusively by State Education Department personnel. The tests administered under the Pupil Evaluation Program (PEP) consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State.

Similarly, the overwhelming majority of the questions on the comprehensive achievement tests consist of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination. Although some of the comprehensive achievement examinations may, among scores of multiple-choice questions, have a question asking students to write an essay on one of several topics specified in the exam, which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and to grade the answer accordingly, the likelihood of such an event is so minimal and the State procedures designed to guard

against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Levitt I, supra,* 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures (described above) provide an adequate check against any misuse of essay questions.[7]

In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. As the Supreme Court pointed out in *Nyquist, supra,* 413 U.S. at 771, "not every law

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[7] Our dissenting brother takes the view that a one-time annual review of the State-prepared examination materials will not suffice to ensure the neutrality of the State aid. Examinations prepared by State personnel for use in *all* schools in the State (public and private), however, unlike the examinations prepared by sectarian school teachers in *Levitt I,* do not present a "substantial risk" of being designed, unconsciously or otherwise, to further religious education. It was the presence of this risk that induced the Supreme Court to hold in *Levitt I* that the State could not reimburse sectarian schools for the cost of administering in-class examinations and to hold in *New York v. Cathedral Academy,* 434 U.S. 125 (1977), that the State could not provide reimbursements for costs incurred prior to the decision in *Levitt I* without making a detailed inquiry into the content of each examination, which itself would violate the Establishment Clause. See 413 U.S. at 480, 434 U.S. at 131.

We see no indication in either of these decisions that the State would have to make individual determinations regarding the neutrality of State-prepared examinations. Indeed, in *Wolman* the Court recognized as a general rule that the performance by state personnel of their functions outside of the sectarian school environment does not present any significant danger of promoting religious values, even when their functions relate directly to the educational process. 433 U.S. at 247-48. Accordingly, in the absence of any reason for believing that State-prepared examinations here might be radically changed to elicit or encourage religious views, our determination that the examinations do not foster religion should be definitive.

that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is for that reason alone, constitutionally invalid." In the absence of some other potential for diversion we fail to find the possible indirect benefit from this feature of the Statute sufficient to warrant its nullification.

The second distinction between the Ohio statutory provision upheld in *Wolman* and the New York Statute is that the latter, unlike the former, authorizes direct reimbursement to non-public schools for their administration of the exams and for attendance-taking. Although the Supreme Court has on occasion noted the absence of authorization for direct payment to a sectarian school as a factor to be considered, see *Wolman, supra,* 433 U.S. at 253; *Lemon, supra,* 403 at 621; and *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court has never declared a statute unconstitutional because of its presence. Putting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does not improperly promote religion when it reimburses the schools for the cost of administering the exams.

The Supreme Court's disapproval of statutes authorizing cash payments has turned on the fact that no reasonable guarantee was provided for insuring that the money

would be applied only to secular activities. See, e.g., *Levitt I, supra,* 413 U.S. at 480; *Nyquist, supra,* 413 U.S. at 774; *Lemon, supra,* 403 U.S. at 619-22. In each of these cases the Court found either that no effort had been made to restrict the benefit of the financial aid to wholly secular activities or that any efforts to do so would have involved an intolerable level of state surveillance of the sectarian institutions. *Levitt I, supra,* at 480; *Nyquist, supra,* at 780; *Lemon, supra,* at 620-22; cf. *Walz, supra,* 397 U.S. at 675. These decisions thus imply that direct cash payments are permissible if they serve exclusively secular purposes and do not involve excessive entanglement. For example, in *Levitt I,* where the Court struck down the predecessor to amended Chapter 507, the Court commented that the invalid lump-sum payments could not be reduced by a court to "an amount corresponding to the actual costs incurred in performing reimbursable secular services" because this "is a legislative, not a judicial, function." 413 U.S. at 482. The implication is that if the legislature chose to exercise its power to fund purely secular activities, the Court would not stand in the way. See *Nyquist, supra,* 413 U.S. at 774. In sum a statute does not foster religious education simply because it provides aid in cash rather than in kind.

Turning to the Statute's reimbursement of a sectarian school's attendance-taking, as distinguished from administration of examinations, since record-keeping is essentially a ministerial task lacking ideological content or use, it is not challengeable on *Meek's* theory that any state assistance to the educational process advances religion. Of course it might be argued that since sectarian schools would otherwise be required to expend funds for the taking and recording of attendance, they benefit to

the extent that reimbursement facilitates an activity that is essential to the conduct of the sectarian enterprise as a whole or at least "frees up" funds for religious purposes. The "freeing-up" argument, however, has been consistently rejected by the Supreme Court. See, e.g., *Nyquist, supra,* 413 U.S. at 775. Although record-keeping may be part of the operation of a sectarian school, we do not view it as approaching the status of a facility such as a classroom, which might be used for secular education, see *id.* In our view it is closer to the operation of buses for the transportation of children to sectarian schools, the cost of which may be reimbursed by the State without violation of the Establishment Clause. *Everson v. Board of Education, supra.* Although school busing may be analogized to "general welfare" services of the type upheld in *Meek* and *Wolman,* the Court in *Wolman* rationalized reimbursement for busing as permissible for the reasons that the activity is unrelated to any aspect of the curriculum and the school does not determine the frequency of the activity subsidized. 433 U.S. at 253. In view of *Wolman's* affirmation of this aspect of *Everson* we are satisfied that the State's subsidization of attendance-taking in the present case should be upheld, particularly in the absence of any suggestion that such record-keeping can be used to foster an ideological outlook.

Having concluded that amended Chapter 507 passes the primary-purpose test, we pass on to the question of whether it excessively entangles the State in the administration of sectarian institutions, an issue which we were not required to resolve in *Levitt II,* in view of our holding there. 414 F. Supp. at 1180.

Where a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage

in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities are religious in character, the risk of entanglement is too great to permit governmental involvement. See, e.g., *Lemon, supra,* 403 U.S. at 619-22; *Meek, supra,* 421 U.S. at 370-71. The activities subsidized under the Statute here at issue, however, do not pose any substantial risk of such entanglement.[8]

The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activi-

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[8] We do not believe that the State must review every examination paper whose mark might have been influenced by the religious values or beliefs of the grader in order to be "certain" that the subsidized teacher's time is not used to inculcate religion. See *Lemon, supra,* 403 U.S. at 609. Whether the procedures employed by the State to prevent improper use of its aid achieve the requisite degree of certainty must be determined in light of the subsidized activity's potential for use as a vehicle for religious indoctrination. *Lemon* involved subsidies for personnel expenses attributable to the teaching process as a whole (for certain classes), an activity which presents a continuous and comprehensive potential for religious indoctrination, since the omniscient influence of the teacher, particularly in lower schools, is the paramount factor determining the character of classroom instruction. See *Lemon, supra,* 403 U.S. at 618.

In contrast, the opportunity for religious indoctrination in the grading of end-of-course regents examinations is virtually nil. As we have noted, these examinations, given but once a year in any one class, require the grader to exercise subjective judgment only in connection with one, or possibly two, questions out of scores. These questions are prepared by the State, which provides instructions to guide the grading of essay questions. Clearly, the potential for advancing religion associated with the subsidized activities in this case is vastly inferior to that which the Court faced in *Lemon.*

ties, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision.[9]

For the foregoing reasons we conclude that Chapter 507, as amended, does not violate the Establishment Clause.

Settle judgment on notice.

Dated: New York, NY
December 11, 1978

WALTER R. MANSFIELD, U.S.C.J.

MORRIS E. LASKER, U.S.D.J.

I dissent in a separate opinion.

ROBERT J. WARD, U.S.D.J.

[9] The possibility that the process of appropriating funds to implement amended Chapter 507 might divide the State legislature among religious lines, which has not been suggested by the parties, does not pose a factor of sufficient consequence to warrant invalidation of the subsidization as constitutionally impermissible. See *Meek, supra,* 421 U.S. at 365, n.15. Indeed, in *Wolman* the Court upheld several provisions of the Ohio statute, involving annual expenditures of millions of dollars, without any reference to the potential for such discord in annual legislative consideration of expenditure bills.

Committee for Public Education and Religious Liberty, et al. v. Arthur Levitt, et al.
74 Civ. 2648 RJW

WARD, *District Judge* (Dissenting)

When the constitutionality of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("Chapter 507" or "the statute") was previously raised before this three-judge Court, we held that the statute violated the Establishment Clause because it had a primary effect[1] of advancing religion. *Committee for Public Education v. Levitt,* 414 F. Supp. 1174 (S.D.N.Y. 1976) ("*Levitt II*"). Our decision was based in large measure on the Supreme Court's holding in *Meek v. Pittinger,* 421 U.S. 349 (1975). In *Meek,* the Court invalidated a Pennsylvania statute's $12 million authorization for the loan of secular, nonideological, and neutral instructional materials to that state's predominantly church-related nonpublic schools. The Court reasoned:

> To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality

[1] It is well-settled that "[i]n order to pass muster [under the Establishment Clause], a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." *Wolman v. Walter,* 433 U.S. 299, 236 (1977); *accord Roemer v. Maryland Public Works Board,* 426 U.S. 736, 748 (1976); *Meek v. Pittenger,* 421 U.S. 349, 358 (1975); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-73 (1973); *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. *Hunt v. McNair,* 413 U.S. 734, 743.

The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman,* 403 U.S., at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id.,* at 657 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689. For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and

> equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S., at 781-783, and n.39, and thus constitutes an impermissible establishment of religion.

421 U.S. at 365-66 (footnote omitted).

Reading *Meek* to state that the provision of substantial amounts of direct aid to the educational function of sectarian elementary and secondary schools impermissibly advanced religion by aiding the sectarian school enterprise as a whole, we struck down Chapter 507's programs reimbursing New York sectarian schools[2] for the costs—primarily teacher salaries and fringe benefits[3]—incurred in complying with state-mandated testing and pupil attendance reporting. Eighty-five percent of the 1,954 nonpublic institutions eligible to receive reimbursement under the statute were religiously-affiliated elementary and secondary schools. The purpose of many of those schools was to provide an integrated secular and religious education, and their teaching process was largely devoted to instilling religious values and belief.[4] *See Meek, supra,* 421 U.S.

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[2] In view of its clear severability clause, we upheld the statute to the extent that it authorized funds to nonsectarian private schools. *Levitt II, supra,* 414 F. Supp. at 1180 & n.9.

[3] The reimbursement was not for salary supplements given teachers to compensate for the time devoted to funded activities, but rather represented a percentage of ordinary compensation which would have been paid even if the state-required services were not performed. *Levitt II, supra,* 414 F. Supp. at 1176.

[4] According to defendants' answers to plaintiffs' interrogatories filed prior to our decision in *Levitt II,* the recipients of the aid included schools which: "(1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and

at 356, 364, 366; *Lemon v. Kurtzman,* 403 U.S. 602, 616-17 (1971). As in *Meek,* the amount of aid, estimated at $8-$10 million annually, was substantial[5] and the form of the aid—payments to the schools themselves, subsidizing their operating costs—was direct. Accordingly, even though Chapter 507 was intended to aid only the secular educational function of the schools,[6] we held that the statute inevitably resulted in the direct and substantial advancement of religious activity.

My colleagues do not contend that we misconstrued or misapplied *Meek's* standard in our opinion in *Levitt II.* It is rather their position that in *Wolman v. Walter,* 433 U.S. 229 (1977), the Court *sub silentio* rejected the principles set forth in *Meek* two years earlier,[7] and adopted a new standard under which substantial direct aid to the educational function of sectarian schools is permissible, so

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programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and/or (10) impose religious restrictions on what the faculty may teach." *Compare Meek, supra,* 421 U.S. at 356.

[5] Compare the $12 million for the loan of instructional materials and equipment involved in *Meek,* where more than 75% of the 1,320 schools were religiously affiliated. 421 U.S. at 364-65.

[6] The legislative purpose of the statute was "to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities." 1974 N.Y. Laws ch. 507, § 1.

[7] Those principles were reaffirmed by the Court in *Roemer v. Maryland Public Works Board,* 426 U.S. 736, 753-55 (1976).

long as there is no substantial risk that the aid will be used for religious purposes. I see in *Wolman* no such retreat from *Meek* or reformulation of the applicable principles. I believe that *Meek* remains valid and that Chapter 507 cannot pass constitutional muster thereunder. Accordingly, I respectfully dissent.

That the testing and scoring provision in *Wolman*[8] was upheld does not, in my opinion, indicate that the Court has rejected *Meek's* standard as to the permissibility of aid to the educational function of sectarian schools. *Meek* did not hold that all such aid was *ipso facto* unconstitutional, but only that substantial direct aid was. 421 U.S. at 359, 364-66. In upholding *Wolman's* provision, the Court expressly noted that the Ohio statute did not authorize any payment to nonpublic school personnel for the costs of administering the tests. 433 U.S. at 239. Thus, it could not be claimed that the schools received direct aid in the form of such payments. Moreover, the Court reasoned, since nonpublic school personnel did not participate in either the drafting or the scoring of the tests, "[t]he nonpublic school [did] not control the content of the test or its result. This serve[d] to prevent the use of the test as a part of religious teaching, and thus avoid[ed] that kind of direct aid to religion found present in *Levitt* [v. *Committee for Public Education,* 413 U.S. 472 (1973)]."[9] 433 U.S. at 239-40. Because the Ohio

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[8] The Ohio statute under review in *Wolman* authorized the state "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." 433 U.S. at 238-39.

[9] In *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973) (*"Levitt I"*), the Court invalidated the predecessor statute to Chapter 507, which had provided for reimbursement to sectarian schools of the expenses of teacher-prepared testing as

statute, in contrast to Chapter 507, did not involve direct aid to sectarian schools, I see no inconsistency between *Meek* and the result in *Wolman*.

Nor do I believe that there is anything in *Wolman* which stands for the proposition that substantial direct aid to the religious schools' educational function which has some potential for religious use is now constitutionally permissible so long as the possibility is not substantial. In addition to the testing and scoring services, the only provisions upheld in *Wolman* which included aid to the schools' educational function[10] were the programs for therapeutic, guidance, and remedial services provided

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well as standardized examinations and recordkeeping. While the Court's decision focused on the fact that no means were available to assure that the internally-prepared tests were free of religious instruction, *id.* at 480, the Court in *Wolman* made it clear that *Levitt I* did not imply that reimbursement to religious schools for the costs of testing would be constitutionally permissible if teacher-prepared examinations were eliminated. "The Court did not reach any issue regarding the standardized testing, for it found its funding inseparable from the unconstitutional funding of teacher-prepared testing." 433 U.S. at 240 n.8.

[10] The Court also upheld the provision of speech, hearing, and psychological diagnostic services to pupils attending nonpublic schools on the basis that they were public health services which could constitutionally be supplied to nonpublic school children as part of a general legislative program made available to all students. 433 U.S. at 242-44. The permissibility of including sectarian schools in programs providing "bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary religion-oriented educational function of the sectarian school" was explicitly reaffirmed in *Meek*, 421 U.S. at 364, 371 n.21; *accord, Lemon, supra,* 403 U.S. at 616-17; *Everson v. Board of Education,* 330 U.S. 1, 14, 17-18 (1947). The Court indicated that the Pennsylvania statute's provision of diagnostic speech and hearing services would have been permissible as such a general welfare service. 421 U.S. at 371 n.21. The program was invalidated, however, because it was found to be unseverable from the unconstitutional provisions of the statute. *Id.; accord, Wolman, supra,* 433 U.S. at 243-44.

directly to students by public employees at public facilities,[11] *id.* at 248, and for the loan of textbooks to students, *id.* at 238. So far as I can discern, there is nothing in Justice Blackmun's opinion which indicates that either the testing and scoring or the therapeutic services were seen as presenting any potential whatsoever for diversion to religious use. Nor is there any suggestion that the aid would have been acceptable had any such possibility existed. Indeed, in order to uphold the loan of textbooks, the Court was forced to rely on the "unique presumption" of the non-divertibility of such aid created in *Board of Education v. Allen,* 392 U.S. 236 (1968). 433 U.S. at 251-52 n.18. Furthermore, the Court struck down the provision for the loan of instructional materials and equipment which were "incapable of diversion to religious use." *Id.* at 248-51.

Moreover, the Court clearly reaffirmed *Meek* in *Wolman* when it invalidated the programs providing field trip transportation and services to nonpublic schools students and the loan of instructional materials and equipment to pupils or their parents. In holding that the field trip provision had the impermissible effect of advancing religion, the Court, relying on *Meek,* reasoned that "the field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution," impermissible direct aid is the inevitable result. *Id.* at 254. Furthermore, in striking down the loan of instructional materials and equipment, Justice Blackmun's opinion quoted *Meek* as follows:

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[11] As with the testing and scoring services, no direct aid was involved. No payments were provided to the schools, nor did the schools exercise control over the services. 433 U.S. at 244-48.

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman,* 403 U.S. at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.,* at 657 (opinion of Brennan, J.)." 421 U.S., at 366.

Id. at 249-50. The Court concluded, just as it had in *Meek,* that "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flow[ed] in part in support of the religious role of the schools." *Id.* at 250.

Given this reaffirmation of *Meek,* it seems clear to me that the constitutional standard set forth in that opinion is still controlling. I believe that Chapter 507 does not satisfy that standard. The statute is intended to compensate for secular educational services, but the funds granted thereunder flow directly to schools dedicated to a religious mission. Therefore, the state aid "inescapably results in the direct and substantial advancement of religious activity." *Meek, supra,* 421 U.S. at 366.

In my opinion, the funds provided for recordkeeping under Chapter 507 have the impermissible effect of advancing religion for still another reason. Pupil attendance reporting is as essential to the schools' sectarian educational function as it is to the secular aspect of the curriculum. Yet, as was the case with the payments to non-

public schools for nonideological maintenance and repair services involved in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 774-80 (1973), no attempt has been made to restrict payments to those expenditures which are related exclusively to the schools' secular functions. Nor is such a restriction possible. Consequently, as in *Nyquist,* the state aid impermissibly advances religion by directly subsidizing the religious activities of sectarian schools. *Cf. Levitt v. Committee for Public Education,* 413 U.S. 472, 480 (1973) (*"Levitt I"*).

Chapter 507 has the further constitutional defect, in my view, of requiring excessive governmental entanglement with religion. My colleagues have recognized that some of the testing materials could be diverted to religious use and that the records submitted in support of claims for reimbursement could be inaccurate. Once these possibilities for diversion have been detected, it seems to me that excessive state entanglement with religion is inevitable in order to avoid the impermissible effect of advancing religion:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. . . .
>
> . . . But the potential for impermissible fostering of religion is present. . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . .

Lemon, supra, 403 U.S. at 618-19; *accord, Wolman, supra,* 433 U.S. at 254; *Meek, supra,* 421 U.S. at 369-70.

In order to be *certain* that teachers whose salaries are subsidized by Chapter 507 do not use the testing materials for religious purposes, I believe that the state's current procedure of reviewing a random sample of examination papers for academic content would have to be supplemented by a detailed search for religious values or belief in the grading of all test papers in which the teacher exercises subjective judgment. For "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Lemon, supra,* 403 U.S. at 619; *accord, Wolman, supra,* 433 U.S. at 254; *see Levitt I, supra,* 413 U.S. at 481. Such a system of continuous monitoring of the grading of examinations by religious school teachers would constitute excessive entanglement between church and state. *See Wolman, supra,* 433 U.S. at 254; *Meek, supra,* 421 U.S. at 369-72; *Lemon, supra,* 403 U.S. at 617-19.

In addition, most of the state aid under Chapter 507 is for reimbursement of the cost of teacher salaries and fringe benefits. Such reimbursable costs are based upon the number of hours teachers devote to the funded activities. The schools are required to submit a form entitled "Justification of Salary and Fringe Benefit Costs Claimed For State Aid For Testing, Reporting and Evaluating" on which the reimbursable costs are calculated by first computing the percentage of aggregate total work time devoted to funded services and then multiplying the amount of aggregate wages and benefits by the percentage. While this form and the additional reporting

and auditing procedures[12] suffice to ensure the mathematical accuracy of the computations, they do

[12] Chapter 507 provides in this regard:

§ 4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§ 5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

§ 6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§ 7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in

nothing to verify that the percentage of total time claimed for reimbursable activities is based upon the number of hours teachers have actually devoted to purely secular functions.[13] Indeed, in order to be certain, as the

section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

In addition, section 176.2 of the Regulations of the Commissioner of Education provides:

Application for apportionment and required accounting records.

(a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner of Education.

(b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:

(1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include accounts for salaries, supplies and materials, contractual expenses and fringe benefits.

(2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.

(3) An individual salary record for each employee involved in providing services for which apportionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.

(4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

[13] I do not agree with my colleagues' suggestion that the accuracy of the time charged can be safeguarded by comparing the claims of private schools with those of public schools. To my knowledge, there is nothing in the record which indicates that any such comparison is included in the auditing pro-

Establishment Clause demands, that none of the schools' religious functions have been served during the time charged, constant on-site inspection of sectarian schools would be required. Such a system of continuous state surveillance of the activities of religious schools would clearly constitute excessive state entanglement with religion. *See Lemon, supra,* 403 U.S. at 617-19, 621-22.

Moreover, in my opinion, the instant statute has resulted in excessive entanglement of yet another sort. To determine the constitutionality under the Establishment Clause of the aid provided by Chapter 507, my colleagues have examined for possible religious meaning the sample tests and other documents submitted by the parties and have decided on the basis of this evidence that there was no substantial risk that the state aid could be used for religious purposes. The Supreme Court has stated, however, that the very adjudication required under such an approach is, in itself, excessive governmental entanglement with religion. In *New York v. Cathedral Academy,* 434 U.S. 125 (1977), the Court held that New York State could not reimburse sectarian schools for the costs of state-mandated recordkeeping and testing services which were incurred in reliance on the predecessor statute to Chapter 507 before it was held unconstitutional in *Levitt I.* In response to the sectarian school plaintiff's argument that the Court of Claims would review all expenditures for which reimbursement was sought, in order to be certain that state funds did not subsidize sectarian activites, Justice Stewart, speaking for the majority, explained:

cedures, *see* Footnote 12, *supra,* or which suggests that public schools even maintain comparable time records. In any event, I do not believe that the comparisons by approximation are sufficient to satisfy the dictates of the Establishment Clause.

> [E]ven if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court . . . would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. Cf. *Presbyterian Church v. Blue Hull Mem. Presb. Church,* 393 U.S. 440.

434 U.S. at 132-33.

In the instant case, it would appear that a one-time review such as that contemplated in *Cathedral Academy* would not suffice to ensure the neutrality of the aid provided by the New York statute. Chapter 507 authorizes reimbursement for teacher-time devoted not only to the reporting and examination programs currently in effect, but also to such "other similar state prepared examinations and reporting procedures" as may be developed in the future. 1974 N.Y. Laws ch. 507, § 3. Furthermore,

even within the current testing programs, the examination questions presented to students and graded by state-subsidized teachers are constantly changing. While the majority may be satisfied that the risk of diversion to religious use presented by the sample examination questions and materials they have reviewed to date is not substantial, I know of no way short of continuing surveillance to guarantee that the same is true of materials and examinations prepared in the future.

Accordingly, I conclude that Chapter 507 is unconstitutional under the Establishment Clause to the extent that it authorizes the allocation of state funds to sectarian schools,[14] both because it has a primary effect of advancing religion and because it fosters excessive governmental entanglement with religion.

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[14] Section 9 of the statute contains a severability clause in which the legislature expressed a clear intent that the act remain in force as to nonsectarian schools should its application as to sectarian schools be held to violate the Establishment Clause. *See* 1974 N.Y. Laws ch. 507, as amended by ch. 508, § 9. *Compare Sloan v. Lemon,* 413 U.S. 825, 833-34 (1973). Accordingly my conclusion as to the unconstitutionality of the statute is limited to its application to sectarian schools.